Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1998

H. N. AND FRANCES C. BERGER FOUNDATION,
Petitioner,

v.

CITY OF ESCONDIDO, JERRY HARMON, individually and as a member of the City of Escondido Mobilehome Rent Review Board; SID HOLLINS, individually and as a member of the City of Escondido Mobilehome Rent Review Board; RICHARD A. FOSTER, individually and as a member of the City of Escondido Mobilehome Rent Review Board; LORI HOLT PFEILER, individually and as a member of the City of Escondido Mobilehome Rent Review Board; ELMER CAMERON, individually and as a member of the City of Escondido Mobilehome Rent Review Board,
Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the application of Escondido's mobile home park rent control law, which transfers marketable interests in Petitioner's realty to certain residents of Petitioner's mobile home park without just compensation, comprise a regulatory taking in violation of the Fifth and Fourteenth Amendments?

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Petitioner H. N. and Frances C. Berger Foundation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, entered in the above-entitled proceeding on August 17, 1998.

OPINIONS BELOW

The decision of the Court of Appeal of the State of California is unreported and is reproduced as Appendix (App.) A. The final judgment of the California Superior Court is unreported and is reproduced as Appendix C.

JURISDICTION

The opinion of the Court of Appeal of the State of California that is the subject of this petition was filed and entered on August 17, 1998. App. A. The order of the California Supreme Court denying Petitioner's petition for review was entered on November 24, 1998. App. B. The California Court of Appeal considered and decided the question of whether evidence purporting to show that a mobile home rent control ordinance failed to substantially advance legitimate state interests supported a claim for an uncompensated regulatory taking of Petitioner's property in violation of the Fifth and Fourteenth Amendments to the United States Constitution. This petition for writ of certiorari has been timely filed in accordance with Rule 13.1 of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part, "private property [shall not] be taken for public use, without just compensation."

Escondido Municipal Code § 29-101, *et seq.*, codifies an "Ordinance of the City of Escondido Establishing Mobilehome Rent Protection," popularly known as Proposition K (Rent Ordinance), which imposes rent control on privately owned

mobile home parks in Escondido. The full text of the Rent Ordinance is reproduced at Appendix E.

The California Mobilehome Residency Law (Residency Law), codified at Section 798, *et seq.* of the California Civil Code, regulates mobile home space tenancies and the operation of mobile home parks. Park owners cannot (1) terminate tenancies without specified cause;[1] (2) require removal of mobile home coaches when tenancies end;[2] or (3) disapprove incoming tenants who purchase mobile home coaches so long as the purchasers are creditworthy and unlikely to violate park rules.[3] Pertinent portions of the Residency Law are reproduced at Appendix F.

STATEMENT OF THE CASE

This case involves a regulatory takings challenge to the same ordinance that was challenged as a physical taking in *Yee v. City of Escondido,* 503 U.S. 519 (1992).

A. Escondido's Mobile Home Rent Control Ordinance and the *Yee* Litigation

On June 7, 1988, Respondent City of Escondido (City) enacted Escondido Municipal Code (EMC) § 29-101, *et seq.* Under the terms of the Rent Ordinance, space rents in privately owned mobile home parks in Escondido were rolled back to the levels in effect on January 1, 1986, and could not thereafter be increased without the approval of the City Council, sitting as the Mobilehome Rental Review Board (Rent Board).[4]

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[1] Calif. Civ. Code § 798.55, App. F-1.

[2] Calif. Civ. Code § 798.73, App. F-2.

[3] Calif. Civ. Code § 798.74, App. F-3-4.

[4] App. D-3.

Shortly after the enactment of the Rent Ordinance, several owners of affected mobile home parks brought suit, alleging that the law, in conjunction with California's Mobilehome Residency Law, authorized a permanent physical invasion of their property in violation of the Takings Clause of the Fifth Amendment to the United States Constitution. These claims were ultimately rejected by this Court in *Yee*. Although it found that the Rent Ordinance did not constitute a permanent physical invasion of park owners' property, this Court expressly left open the question of whether the law effected a regulatory taking by failing to substantially advance legitimate state interests.[5]

B. The Rent Ordinance Is Applied to the Berger Foundation's Property

Petitioner H. N. and Frances C. Berger Foundation (Berger Foundation) is a charitable foundation that includes among its assets the Town and Country Club Mobilehome Park (Town and Country), a park that is subject to Escondido's Rent Ordinance.[6]

In December of 1991, the Berger Foundation filed an application with the Rent Board requesting an average rent increase at the Town and Country of $69.70 per space per month.[7] Over two years later, on January 12, 1994, the Rent Board granted a rent increase of only $10 per space per month.[8] This amounted to a 20% *decrease* in real rents from the levels that had been in effect at the Town and Country in January, 1986.[9]

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[5] *Yee*, 503 U.S. at 527, 530, 531, 538.

[6] Court of Appeal Appellant's Appendix (AA) at 2.

[7] *Id.* at 223.

[8] *Id.* at 181.

[9] *Id.* at 182.

C. The Berger Foundation Files Its Regulatory Takings Claim

The Berger Foundation filed this suit in February of 1994, alleging that the City's actions effected an uncompensated regulatory taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The core allegations of the complaint were substantially identical to those that were raised in *Yee*:

> Residents of the Town and Country have the right (under the Residency Law) to occupy their spaces indefinitely at below market rents, as well as the right to sell their mobile home coaches in place to a buyer of their choosing. Under the Rent Ordinance, the buyer in such a sale acquires not just the mobile home coach but the right to occupy a space in the Town and Country indefinitely at below market rents.
>
> . . . .
>
> When a resident of the Town and Country sells his or her mobile home coach, a premium is received from the purchaser corresponding to the coach's increased value attributable to the City's enforcement of the Rent Ordinance. This premium, which is paid for the transfer of a valuable property interest rightfully belonging to the Berger Foundation, will never be recovered by either the foundation or any subsequent resident of the Town and Country.[10]

This one-time wealth transfer accrues only to the initial residents of the Town and Country at the time the Rent Ordinance was adopted; subsequent buyers of mobile homes in rent controlled parks must pay the full expected value of the

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[10] First Amended Complaint, AA at 5-6.

continued application of the Rent Ordinance.[11] Consequently, the Berger Foundation argued, the law fails to substantially advance the goal of preserving the supply of affordable rental housing--or any other objective except maintaining the value of the one time wealth transfer from the Berger Foundation to the initial residents of the Town and Country, some or all of whom may not yet have cashed in their premiums by selling their coaches.[12]

Prior to trial, the parties stipulated that the market value of the Town and Country had been depressed by operation of the Rent Ordinance and that, but for the City's application of the law, the Berger Foundation would have implemented rent increases of more than $10 per space in 1991.[13] The parties also agreed that the Berger Foundation did not contend it had been denied a "fair return" on the Town and Country nor that it had been deprived of "substantially all economically viable use of its land."[14] The issue was thus narrowed to whether the Rent Board's actions substantially advanced legitimate state interests within the meaning of this Court's analysis in *Yee*.

D. The Trial Court Rejects This Court's Reasoning in *Yee* and Grants the City's Motion for Nonsuit

On June 17, 1996, the Berger Foundation made its opening statement at trial.[15] Tracking this Court's regulatory takings analysis in *Yee*, the Berger Foundation stated it was prepared to offer expert testimony that the application of the Rent Ordinance to the Town and Country served only to perpetuate the one-time

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[11] *Id.* at 184.

[12] *Id.* at 183-85.

[13] AA at 228.

[14] *Id.*

[15] *Id.* at 176.

wealth transfer described in *Yee*.[16] The City did not contest this evidence or suggest the existence of any contrary evidence, but immediately entered a motion for nonsuit which was granted.[17] In its statement of decision, the trial court rejected this Court's *Yee* analysis, citing to state appellate court decisions as having "previously rejected park owner arguments that this Ordinance and other similar mobilehome rent ordinances do not advance legitimate state interests."[18] The court also ruled that regulatory takings claims such as the one at bar do not receive heightened judicial scrutiny, as mandated by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).[19]

A judgment of dismissal as to the entire complaint was entered on August 30, 1996.[20]

E. The Court of Appeal Affirms, Rejecting This Court's *Yee* Analysis in Favor of a Deferential "Rational Basis" Standard of Review

On appeal, the Berger Foundation's opening brief raised the federal constitutional issue of whether the application of the Rent Ordinance effected an uncompensated regulatory taking in violation of the Fifth and Fourteenth Amendments, as well as the applicability of heightened scrutiny under *Nollan* and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The Berger Foundation argued that this Court has established that land use regulations will effect a regulatory taking if they fail to "substantially

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[16] *Id.* at 184-85.

[17] *Id.* at 109.

[18] App. D-13.

[19] *Id.*

[20] App. C-1.

advance legitimate state interests."[21] In the context of mobile home rent control, *Yee* identified this "substantial advancement" test with the core factual issue raised by the Berger Foundation in the present case: whether the application of the law merely effects a transfer of ownership interests from park owners to initial park residents, with no residual benefits to any other individuals.[22]

Nevertheless, the court below summarily rejected these considerations as being irrelevant to the Berger Foundation's regulatory takings claim. Instead of following the reasoning of this Court in *Yee*, the court below employed a trivial and meaningless interpretation of the "substantial advancement" standard. Pointing to no evidence whatsoever to support its ruling (since the City had advanced none), the court of appeal concluded that the Escondido ordinance substantially advanced legitimate state interests because some park residents might be living on fixed incomes, and such hypothetical residents, if they existed, would "***certainly***" be benefited if they paid lower rents because of the ordinance.[23]

By trivializing the concept of "substantial advancement," hypothesizing the existence of evidence to meet this reduced threshold, and ignoring contrary evidence outlined in the Berger Foundation's opening statement, the court below makes a travesty of this Court's regulatory takings analysis in *Yee v. City of Escondido*. This decision also directly conflicts with the takings jurisprudence of the Ninth Circuit Court of Appeals and the highest state court of New York.

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[21] *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Nollan*, 483 U.S. at 834; *Dolan*, 512 U.S. at 385.

[22] *Yee v. City of Escondido*, 503 U.S. at 530.

[23] App. A-19.

The Berger Foundation filed a timely petition for review to the California Supreme Court, which was denied on November 24, 1998.[24]

REASONS FOR GRANTING THE PETITION

I

THE PETITION SHOULD BE GRANTED TO RESOLVE THE REGULATORY TAKINGS ISSUE RAISED BUT LEFT OPEN BY THIS COURT IN *YEE v. CITY OF ESCONDIDO*

This case involves a Fifth Amendment takings challenge to the same ordinance that was before this Court in *Yee v. City of Escondido*, 503 U.S. 519. In *Yee*, the petitioners alleged that Escondido's Rent Ordinance effected a permanent physical invasion of their mobile home parks. This Court rejected the Yees' physical takings premise, but left the door open to a *regulatory* takings claim. Like the present Petitioner, the plaintiffs in *Yee* alleged that

> the rent control ordinance has transferred a discrete interest in land--the right to occupy the land indefinitely at a submarket rent--from the park owner to the mobile home owner.[25]

While recognizing the relevance of this claim in a Fifth Amendment takings context, the Court found it inappropriately characterized as a *physical* taking:

> This argument, ***while perhaps within the scope of our regulatory taking cases***, cannot be squared easily with our cases on physical takings.[26]

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[24] App. B-1.

[25] *Yee*, 503 U.S. at 527.

[26] *Id.* (emphasis added).

The *Yee* Court took careful note of the plaintiffs' allegations--mirrored by the complaint in the present case--that

> the ordinance benefits incumbent mobile home owners without benefiting future mobile home owners, who will be forced to purchase mobile homes at premiums. . . . [A] typical rent control statute will transfer wealth from the landlord to the incumbent tenant and all future tenants. By contrast, petitioners contend that the Escondido ordinance transfers wealth only to the incumbent mobile home owner.[27]

Again, however, the Court found the legal issue infelicitously posed:

> ***This effect might have some bearing on whether the ordinance causes a regulatory taking***, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance.[28]

A third time, the Court turned to the specific allegations of the Yees' complaint and yet again returned to the theme that this challenge should have been framed as a regulatory, rather than a physical, taking:

> Again, ***this effect may be relevant to a regulatory taking argument,*** as it may be one factor a reviewing court would wish to consider in determining whether the ordinance unjustly imposes a burden on petitioners that should "be compensated by the government,

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[27] *Id.* at 530.

[28] *Id.* (citing *Nollan v. California Coastal Commission,* 483 U.S. at 834-35 (emphasis added)).

> rather than remain[ing] disproportionately concentrated on a few persons."[29]

Although the *Yee* petitioners belatedly addressed a regulatory takings argument to this Court (apparently for the first time in the litigation), it was not entertained on prudential grounds.

> Prudence . . . dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question.[30]

Recognizing that no lower court anywhere in the nation had yet ruled on whether such laws effect a regulatory taking, the *Yee* Court determined to

> leave the regulatory taking issue for the California courts to address in the first instance.[31]

That issue has now been addressed. Twenty months after *Yee* was handed down, the present case was brought expressly to take up this Court's invitation to determine whether Escondido's mobile home park rent control effects a regulatory taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

As was true in *Yee*, California's Fourth District Court of Appeal has upheld the Rent Ordinance against claims that it violates park owners' federal constitutional rights, this time in the context of a regulatory takings challenge. Again like *Yee*, this decision stands in direct conflict with a recent opinion on the same issue by the Federal Court of Appeals for the Ninth

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[29] *Id.* at 531 (quoting *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) (emphasis added)).

[30] *Id.* at 538.

[31] *Id.*

Circuit. All of the contingencies that prevented the Court from reaching the regulatory takings issue in *Yee* have been resolved. It is time for this Court to revisit the question it raised but left unanswered in *Yee*: does the operation of Escondido's Rent Ordinance constitute a regulatory taking of mobile home park owners' property?

II

THE DECISION BELOW, FINDING NO REGULATORY TAKING FROM THE APPLICATION OF ESCONDIDO'S MOBILE HOME RENT CONTROL LAW, DIRECTLY CONFLICTS WITH THE NINTH CIRCUIT'S RULING IN *RICHARDSON v. CITY AND COUNTY OF HONOLULU*

The *Yee* Court noted that there were important "institutional" reasons to grant certiorari in that case, referring to a direct conflict between the California appellate court and the Ninth Circuit Court of Appeals on whether laws like the Rent Ordinance comprised *physical* takings.[32] Equally strong considerations warrant granting the present petition, since there is now a conflict between the same California court and the Ninth Circuit on whether ordinances of this kind give rise to a *regulatory* taking.

In *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), the Ninth Circuit struck down a rent control law that was conceptually identical to Escondido's on the same legal theory Petitioner advanced in the court below.[33] Like

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[32] *Id.* at 537-38.

[33] *Richardson* involved a challenge, on various grounds, both to a condominium rent control law (Ordinance 91-96) and to statutory procedures mandating the sale of condominium buildings to their residents (Ordinance 91-95). 124 F.3d at 1153. Only the regulatory takings challenge to the rent control law is relevant to this Petition.

the relationship between mobile homes and mobile home parks in Escondido,

> the land underneath condominiums on Oahu ordinarily is owned by someone other than the owner of the condominium. The condominium owner leases the ground under the condominium, ordinarily for . . . a term of years, after which the rent is subject to renegotiation. . . . [T]he Ordinance caps rents by linking the maximum renegotiated rent to the consumer price index.[34]

In addition to its close resemblance to Escondido's Rent Ordinance, Honolulu's Ordinance 91-96 also included provisions equivalent to the relevant portions of California's Mobilehome Residency Law:

> The Ordinance also contemplates the conveyance of condominiums subject to renegotiated leases on the underlying land. Section 1.10 of the Ordinance facilitates the conveyance or transfer of these renegotiated leases. That section provides that, if an owner-occupant of a condominium conveys or transfers the leasehold interest in the underlying land during a renegotiated rent period to a person who intends to occupy the condominium apartment, the renegotiated land rent shall apply to the transferee tenant. Id. § 1.10. In other words, the owner-occupant of a condominium is free to convey his or her leasehold interest in the underlying land to a person intending to occupy the condominium and the transferee will receive the benefit of the renegotiated land lease.[35]

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[34] *Id.* at 1163.

[35] *Id.* at 1163-64.

In response to this regulatory scheme, the Bishop Estate raised a regulatory takings claim that was indistinguishable from Petitioner's argument in the present case:

> the Estate contends that Ordinance 91-96 fails to substantially further its stated public purposes and, therefore, constitutes a regulatory taking because the Ordinance allows a lessee to monetize a below-market renegotiated rent at the expense of the lessor.[36]

Indeed, like the present Petitioner, the *Richardson* plaintiff modeled its regulatory takings claim on this Court's analysis in *Yee v. City of Escondido*:

> The Bishop Estate makes a similar challenge to Ordinance 91-96. It contends that the Ordinance's conveyance provisions create a premium, which an owner-occupant can capture when she sells a condominium subject to a renegotiated land rent. If the transferee intends to occupy the condominium, she receives the benefit of the renegotiated rent. Hence, the transferor will charge a premium reflecting the net present value of the difference between the renegotiated land rent and the free market land rent.[37]

The Ninth Circuit found the reasoning of *Yee* compelling and struck down Ordinance 91-96 for failing to substantially advance its admittedly legitimate objectives:

> Land use regulations do influence the value of property, but to be constitutional, they must do so in a manner that substantially furthers a legitimate government interest. Ordinance 91-96 does not do

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[36] *Id.* at 1164.

[37] *Id.* at 1165.

> this. It regulates the use of the lessors' property interests in a manner that does not substantially further the goal of creating affordable housing. The absence of a mechanism that prevents lessees from capturing the net present value of the reduced land rent in the form of a premium, means that the Ordinance will not substantially further its goal of creating affordable owner-occupied housing in Honolulu. Incumbent owner occupants who sell to those who intend to occupy the apartment will charge a premium for the benefit of living in a rent controlled condominium. The price of housing ultimately will remain the same. The Ordinance thus effects a regulatory taking.[38]

The court below denied Petitioner's request to submit supplemental briefing on *Richardson* prior to oral argument and issued an opinion that directly conflicts with the federal court's decision. Without mentioning the *Richardson* opinion, the appellate panel implicitly sought to distinguish the cases on the grounds that *Richardson* involved a *facial* challenge to the legitimacy of Honolulu's rent control law, while the Berger Foundation alleges that the law is constitutionally invalid as applied to its particular property.[39] However, this distinction cuts the wrong way. Because it involved a facial challenge, the *Richardson* opinion must be read to hold that laws such as the Rent Ordinance effect a regulatory taking by their mere enactment;[40] the ordinance "does not 'substantially advance' a

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[38] *Id.* at 1165-66.

[39] App. A-16-17.

[40] *See Keystone Bituminous Coal Association v. DeBenedictus*, 480 U.S. 470, 495 (1987).

'legitimate state interest' ***no matter how it is applied.***"[41] In other words, *Richardson* says laws like the Rent Ordinance *always* effect regulatory takings regardless of the facts of a specific case, while the court below insists that allegations identical to those in *Richardson* do not even ***state a claim*** for a taking as applied to any particular property.[42] No stronger conflict can be imagined.

For the same reasons this Court granted the petition for certiorari in *Yee*, the present petition should be granted to resolve the conflict between the California court and the Ninth Circuit Court of Appeals on this important question of federal constitutional law.

III

THE EXTREMELY DEFERENTIAL STANDARD OF REVIEW APPLIED BY THE COURT BELOW DRAINS ALL SUBSTANCE FROM THIS COURT'S DIRECTION THAT PROPERTY REGULATIONS CHALLENGED UNDER THE TAKINGS CLAUSE MUST SUBSTANTIALLY ADVANCE LEGITIMATE STATE INTERESTS, CONFLICTING NOT ONLY WITH THIS COURT BUT ALSO WITH THE HIGHEST STATE COURT OF NEW YORK

In *Nollan v. California Coastal Commission*, this Court established that regulatory takings claims such as the one at bar must be accorded a heightened level of judicial scrutiny.[43] Indeed, the standard of review applicable to such cases has been

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[41] *Yee*, 503 U.S. at 534 (emphasis added).

[42] Although the court of appeal ruled only with respect to the Berger Foundation's property, its analysis leaves no doubt that it would consider the substantial advancement test to be satisfied in every imaginable instance. App. A-19 (finding that rent control "substantially advances" the objective of controlling rents).

[43] 483 U.S. at 834 n.3.

likened by this Court to the heightened scrutiny mandated by the abridgment of freedom of speech or religion.[44] In the context of mobile home rent control, the factors identified by this Court in *Yee* as relevant to a regulatory takings challenge imply some form of elevated scrutiny. This fact has been recognized by commentators who have addressed the questions raised by this case:

> An examination of the facts of *Yee* ***under [Nollan's] heightened standard of review*** will show that courts would rule that Escondido's ordinance effects a regulatory taking. . . . As noted in *Yee*, the rent control ordinance only protects the first tenant of the park pad. . . . It will be difficult for courts to ignore that the rent control ordinance, which purports to benefit all tenants of mobile home parks, makes only one wealth transfer to the initial tenant. Therefore, similarly situated mobile home park owners may now successfully argue that local government has effected a regulatory taking ***under Nollan***.[45]
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> [T]he Escondido rent control ordinance, against the backdrop of the Residency Law, does not substantially advance the interest of permanently preserving moderately priced housing, and therefore, ***fails the Nollan means-ends nexus***.[46]

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[44] *Dolan v. City of Tigard,* 512 U.S. at 392.

[45] Dwight C. Hirsh IV, *Yee v. City of Escondido--A Rejection of the Ninth Circuit's Unique Physical Takings Theory Opens the Gates for Mobile Home Park Owners' Regulatory Takings Claims*, 24 Pac. L.J. 1681, 1721, 1723, 1726 (1993) (emphasis added).

[46] Kari Anne Gallagher, *Comment, Yee v. City of Escondido: Will Mobile Homes Provide an Open Road for the Nollan Analysis?*, 67 Notre Dame L. Rev. 821, 846-47 (1992) (emphasis added).

Nevertheless, the court below rejected this Court's *Nollan* standard, opting instead to employ the most deferential possible standard of review.[47] The seriousness of this error is demonstrated by the outcome: divorced from heightened scrutiny, this Court's "substantial advancement" test collapses to a mere shell, providing no meaningful protection for rights guaranteed under the Takings Clause.

A. The Court Below Applied the Lowest Conceivable Standard of Review to the Berger Foundation's "Substantial Advancement" Claim

The conclusion of the court below, that Escondido's Rent Ordinance substantially advances legitimate state interests, rested on the court's application of the lowest possible level of judicial scrutiny. Invoking a presumption of validity and disregarding the evidence set forth in the Berger Foundation's opening statement, the court reduced the "substantial advancement" test to a crude tautology and upheld the ordinance on the basis of the court's own speculation that facts supporting the City might conceivably exist. The appellate court's entire analysis of the substantial advancement issue consists of the following passage:

> [T]here is no doubt the Board's decision substantially advances the purpose of the Ordinance. Berger sought a rent increase of nearly $70, and the Board approved $16.12 [sic]. The tenants at the Town and Country, especially those living on fixed incomes, were certainly benefited by such a limitation on rent increases on their spaces. . . . We therefore

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[47] App. A-13-15.

> conclude the Board's decision . . . satisfies the government interest prong.[48]

What this key passage says is that by controlling rents at the Town and Country, the City has substantially advanced its objective of controlling rents! But this cannot be the way this Court intended its "substantial advancement" test to be applied. As noted in *Yee*, the inquiry should ***begin*** with the ordinance's one-time transfer of wealth to incumbent coach owners, not ***end*** there because that is what the City intended to accomplish. Such a hyperdeferential standard of review drains this Court's "substantial advancement" test of any meaningful content. If courts can simply *presume* that a law must be substantially advancing legitimate state interests because it redistributes wealth the way its sponsors intended, the fact-based inquiry outlined by this Court in *Yee* would be pointless. As a justice of the California Supreme Court recently stated:

> We as judges write judicial opinions and articulate legal standards because we believe that words, though imperfect, have the power to convey objective meaning. And if words have that power, then a requirement that a law "'substantially advance' the 'legitimate state interest' sought to be achieved" is different from a requirement that a law not be "arbitrary," and, of course, it is different from a requirement that a law have a "rational basis."[49]

Nevertheless, the court below plainly and self-consciously applied a highly deferential due process standard of review to

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[48] App. A-19. It should be noted that no evidence in the record supported the court's presumption that any of the tenants of the Town and Country were living on fixed incomes.

[49] *Santa Monica Beach, Ltd., v. Superior Court*, 968 P.2d 993, 81 Cal. Rptr. 2d 93, 137 (1999) (Chin, J., dissenting) (citation to *Nollan* omitted).

evaluate the "substantial advancement" test for a regulatory taking.

B. The Court Below Recognized That its Deferential Approach to the Substantial Advancement Issue Conflicts with This Court's Mandate of Heightened Judicial Scrutiny but Chose to Follow Conflicting State Court Precedent

The decision of the court below to reject this Court's mandate of heightened scrutiny was fully informed, the issue having been briefed by the parties and addressed in oral argument. As the court of appeal put it,

> Berger urges us to subject the Ordinance to heightened scrutiny of *Dolan* [sic] . . . . [However], Berger has not been denied all use of its property. It may still operate a mobilehome park and will continue to receive rent at a rate it does not contend is not a fair return. Further, City is not trying to exact money as a condition for the granting of any permit. Finally, it is not contended City is claiming any inherent right to deny Berger the right to engage in the rental of mobilehome spaces as justification for rent control. . . . Accordingly, we conclude the Ordinance need not be subject to a heightened *Dolan*-style level of scrutiny.[50]

None of the considerations cited in this passage, of course, have any bearing at all on this Court's mandate to employ heightened scrutiny in evaluating the "substantial advancement" test for regulatory takings. Nevertheless, the court below chose to rely on two decisions of the California Supreme Court in ruling that this case should be governed by a "reasonably necessary" standard of review--which, as noted above, turned out to be an

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[50] App. A-13-15.

abjectly deferential variant of the "minimal rational basis" standard.[51]

C. The Opinion Below Reflects a Systemic Conflict Between the State Courts of California and New York on the Appropriate Level of Scrutiny in Regulatory Takings Cases Brought Under the Fifth Amendment

In addition to conflicting with the Ninth Circuit Court of Appeals on the substantive issue of takings liability, the decision below directly conflicts with the highest state court of New York on the issue of the appropriate standard of review in Fifth Amendment takings cases. This is not an isolated or random inconsistency in the state cases but rather illustrates a fundamental conflict between the approach taken in the courts of the two largest states on a fundamental question of federal constitutional law.

In regulatory takings challenges to rental property regulations, the New York Court of Appeals has twice applied a heightened standard of review to strike down such measures for failing to substantially advance their stated objectives. In doing so, the New York court has expressly relied on this Court's holdings in *Nollan* and *Dolan*--the very cases rejected by the court below as inapplicable to regulations of this sort.

In *Seawall Associates v. City of New York*, 542 N.E.2d 1059, *cert. denied*, 493 U.S. 976 (1989), the highest New York court overturned Local Law 9, a regulation that prohibited the conversion or demolition of single room occupancy (SRO) residential hotels. The stated purpose of the ordinance was to alleviate homelessness by increasing the availability of SRO housing. A group of owners sued the city, arguing that, *inter*

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[51] App. A-15 (relying on *Kavanau v. Santa Monica Rent Control Board*, 16 Cal. 4th 761 (1997), and *Landgate v. California Coastal Commission*, 17 Cal. 4th 1006 (1998)).

alia, Local Law 9 violated the Takings Clause by failing to substantially advance its admittedly legitimate objectives.

Partly because of evidence that Local Law 9 could not significantly advance its stated goal of relieving homelessness, the court of appeals struck down the regulations because "the nexus between the obligations placed on SRO property owners and the alleviation of the highly complex social problem of homelessness is indirect at best and conjectural."[52] In arriving at this conclusion, the New York court recognized that

> the "close nexus" test . . . requires "semi-strict or heightened judicial scrutiny of regulatory means-ends relationships" as articulated in *Nollan*.[53]

Five years after *Seawall*, the New York Court of Appeals applied this Court's *Dolan* decision to find a regulatory taking in *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 618 N.Y.S.2d 857 (1994). In striking down a rent control measure under the Takings Clause, the New York panel observed that *Nollan* and *Dolan* "establish a constitutional minimum floor of protection which this Court lacks authority to diminish under the supremacy clause."[54] Applying the heightened scrutiny required by this Court, the court of appeals found that the challenged measure effected a taking because it "suffers a fatal defect by not substantially advancing a closely and legitimately connected State interest" as required by *Nollan* and *Dolan*.[55]

The reasoning employed by the New York Court of Appeals applies equally to the case at bar. No close relationship

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[52] 542 N.E.2d at 1069.

[53] *Id.* at 1068.

[54] 618 N.Y.S.2d at 860.

[55] *Id.* at 858.

has been shown between maintaining the value of a one-time wealth transfer to a small number of politically favored individuals and the problem of preserving affordable mobile home housing in Escondido. The only nexus that appears from the record is the one identified by the court below: controlling rents in the Town and Country bears an unmistakable nexus to the City's desire to control rents.[56] This tautology, however, falls far short of the requirements of *Nollan* and *Dolan*.

By adopting a stance of virtually total deference to the enactments of local regulators, the court below has come into direct conflict with the rigorous application of *Nollan* and *Dolan* mandated by this Court and employed by the New York Court of Appeals. This Court should grant certiorari in order to resolve this conflict between the two largest states in the nation on their interpretation of important federal questions arising under the Takings Clause.

CONCLUSION

The petition for a writ of certiorari should be GRANTED.

DATED: February, 1999.

Respectfully submitted,

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[56] App. A-19.

Filed 8/17/98*

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

H.N. & FRANCES C. BERGER FOUNDATION,

Plaintiff and Appellant,

v.

CITY OF ESCONDIDO et al.,

Defendants and Respondents.

D027377

(Super. Ct. No. N63317)

APPEAL from a judgment of the Superior Court of San Diego County, Kenneth G. Ziebarth, Jr., Judge. (Retired judge of the San Bernardino Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.) Affirmed.

The H.N. & Frances C. Berger Foundation (Berger) appeals a judgment granting a motion for nonsuit by the City of Escondido (City) and dismissing Berger's inverse condemnation action. Berger contends the trial court erred in holding it failed to state a claim because it stipulated City's rent control ordinance (Escondido Municipal Code § 29-101 et seq. (the Ordinance)) as applied did not deprive it of "substantially all economically viable use of its property" even though it pled facts sufficient to establish the Ordinance did not substantially

* This unpublished disposition contains a number of typographical and other errors which are reproduced verbatim in this Appendix as they appear in the original.

advance a legitimate governmental interest. We recognize Berger need not be deprived of all use of its property to be entitled to compensation. However, we conclude well established precedent would allow Berger's claim to proceed as pled only in a narrow class of land use cases to which it does not belong and Berger may obtain an adequate remedy for any loss by other means. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

City voters approved Proposition K which enacted the Ordinance in 1988. A few months later, Berger became the owner of the Town and Country Mobilehome Park (Town and Country) through a series of gift transfers.[1]

On December 11, 1991, Berger applied to City Mobilehome Park Rental Review Board[2] (the Board) for a $69.70 rent increase[3] at the Town and Country. Berger justified its request

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[1] The Ordinance's history and the efforts by Berger and other mobilehome park owners to invalidate it are well documented in cases from this court and a decision of the United States Supreme Court which upholds the Ordinance's validity. (*Yee v. City of Escondido* (1990) 224 Cal.App.3d 1349, affirmed (1992) 503 U.S. 519 (*Yee I*); *Yee v. Mobilehome Park Rental Review Board* (1993) 17 Cal.App.4th 1097 (*Yee II*).) Berger's facial challenge was consolidated with those of several other park owners and was dismissed after the final decision in *Yee I*. Berger also filed an action in federal court which was dismissed as *res judicata* after the decision in *Yee I*.

[2] The Mobilehome Park Rental Review Board is comprised of the elected members of the City Council.

[3] All rent increase figures refer to the rent per mobilehome space per month unless otherwise specified.

based on six factors specified in the Ordinance.[4] On August 11, 1993, the Board held a public hearing where it received a staff report and heard testimony by Berger's representatives and tenants. The Board then closed the public portion of the hearing and directed its staff to prepare a rate of return analysis to supplement the record. Berger was requested to and did supply financial data to the staff over the next few weeks. The staff issued a supplemental report which detailed several methods for determining rate of return and the results obtained for the Town and Country. The results were mixed, with three methods supporting no increase, two methods supporting increases of over $35 per month and three methods being inconclusive.

The Board's management analyst formally presented the report at a meeting held on November 10, 1993. She told the Board the rate of return analysis had been prepared by an outside consultant. Berger's attorney attempted to augment the record, but the Board denied his request. After deliberation, the Board approved a $10 per month rent increase.

Berger filed its action in early 1994 seeking a writ of mandate to set aside the Board's action and complaints for declaratory relief, injunctive relief and inverse condemnation. In the inverse condemnation pleading, Berger alleged it had been deprived of "one of the most essential attributes of ownership of

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[4] The six factors Berger relied upon were: the increase in the Consumer Price Index (CPI) since 1986; rents in comparable mobile home parks in City; the length of time since the last rent increase; increases in property taxes; increases in operating and maintenance expenses; and the amount and quality of services provided. There are five additional factors specifically listed in the Ordinance including: completion and cost of capital improvements; changes in rent paid by the park operator; changes in utility charges paid by the park operator; the need for repairs caused by other than ordinary wear and tear; and any existing leases entered into between the operator and the affected tenant. In addition, the Board shall consider any other factors it considers relevant.

the Town and Country, *i.e.*, the right to determine the terms upon which possession of Petitioner's real property will be alienated." City's demurrer to the declaratory relief complaint was sustained, and its motion to have the administrative mandamus action heard first was granted. The court later ordered the Board to allow Berger's attorney to augment the administrative record.

Rather than augment the record, the Board held new hearings. At the new hearings, the Board received two new rate of return analyses prepared by outside consultants, one of which resulted indicated Berger should receive a rent increase of between $10 and $16.12. The Board granted Berger a $16.12 per month increase with an additional $6.40 for 17 months covering the time between the first and second hearings. Following the Board's new decision, the court denied Berger's petition and dismissed its complaint for injunctive relief as moot, leaving only the claim for inverse condemnation.

Before trial, Berger discovered the original rate of return analysis had not been prepared by an outside consultant as the Board's management analyst had testified, but by the analyst herself and another staff member. City and Berger stipulated as to the report:

> "The rate of return analysis presented by [management analyst] at the November 10, 1993, meeting of the Mobilehome Rent Review Board was prepared entirely by [management analyst] and [staff member]. Their analysis was based on legal advice from Donald R. Lincoln and Jeffrey Epp and information contained in the Berger Foundation's rent increase application and the administrative record."

The parties also stipulated on the economic issues in the case:

"1. The market value of the Town and Country Club Park under the Rent Ordinance is less than it would be in the absence of the Rent Ordinance.

"2. But for defendants' application of the Rent Ordinance, the Berger Foundation would have implemented rent increases at the Town and Country averaging more than $10.00 per space in December, 1991.

"3. For purposes of case no. N63317, the Berger Foundation does not contend that it has been denied a 'fair return' on the Town and Country.

"4. For purposes of case no. N63317, the Berger Foundation does not contend that it has been denied 'substantially all economically viable use of its land.'"

In its opening statement, Berger indicated it would prove the following facts: First, the Board recognized an increase in rents adjusted up by 75% of the CPI from the Ordinance's start date to the date of application would have justified an increase of $47.16 per month, and the $10.00 increase actually approved amounted to a 20% reduction in rents in real terms from the start date in 1986, while property taxes increased by 159% and operating expenses increased by 50% during the same period. This meant the rate of return analysis was the only factor which could have justified the $10.00 increase.

Second, the rate of return report on which the Board originally relied was prepared by the management analyst out of a "sense of urgency" even though she had never prepared such a report before and was unqualified to do so. Further, she lied when she told the Board the report was prepared by an outside consultant in order to provide the Board with an excuse for justifying the $10.00 increase.

Third, rent control caused the prices of existing mobilehome coaches located in parks to increase in value, actually increasing rather than decreasing the cost of housing. The price increase inured solely to the benefit of the owners at the time the

Ordinance went into effect, who would liquidate this benefit at the time they sold their coaches. Also, there had been a drastic reduction in the shipments of new coaches into California. Thus, the Ordinance was not achieving its stated purpose to reduce housing costs and increase availability of affordable housing while simultaneously making a one time wealth transfer to a politically favored group.

Finally, City's true purpose in enacting rent control was to further its scheme to acquire mobilehome parks at prices well below their market value under threat of condemnation. Thus, City would be achieving its purpose to "help citizens living in mobilehomes on fixed incomes" by shifting the cost of such help from itself to the park owners, until they were forced to sell the parks to City at depressed prices.

At the conclusion of Berger's opening statement, the court granted City's motion for nonsuit, holding Berger failed to state a claim for inverse condemnation once it stipulated it was not contending City's actions had deprived it of a fair return or substantially all viable use of its property. Further, the court held the case was not one subject to a heightened scrutiny.

DISCUSSION

Because this appeal is from a judgment of nonsuit, we must accept all of Berger's evidence as true, indulge in every favorable inference which can be drawn on its behalf and disregard all conflicting evidence. (*Connor v. Great Western Sav. & Loan Assn.* (1968) 69 Cal.2d 850, 857; *Harris v. Smith* (1984) 157 Cal.App.3d 100, 104.) This means "the appellate court must view the evidence as though judgment had gone in favor of [Berger], and order a reversal if such a judgment can be sustained." (*Raber v. Tumin* (1951) 36 Cal.2d 654, 656.) Additionally, to affirm a nonsuit after plaintiff's opening statement, we must assume Berger could not prevail even if it proved the facts presented in its opening statement. (*Loral*

Corp. v. Moyes (1985) 174 Cal.App.3d 268, 272; *Jensen v. Hewlett-Packard Co.* (1993) 14 Cal.App.4th 958, 965-966.)

I

APPLYING THE AGINS TEST

A. In General

The government cannot take private property for public use without just compensation. (U.S. Const., 5th Amend.; Cal. Const., art. I, § 19.) However, the government may regulate the uses to which an owner may devote his or her property (*Village of Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365, 397), although a regulation which "goes too far" may effect a taking for which the owner must be compensated (*Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 415). The inquiry as to when a regulation has gone too far is necessarily one of fact. (*Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 124.) A general test has emerged for review of restrictions imposed by government action which fall short of depriving an owner legal title to his or her land. A land use regulation, such as a zoning law, may, as applied to a particular piece of property, "effect[] a taking if [it] does not substantially advance legitimate state interests, [citation] or denies an owner economically viable use of his land." (*Agins v. Tiburon* (1980) 447 U.S. 255, 260.)[5]

There are, however, two broad categories of cases in which a compensable taking is recognized without resort to a detailed factual economic inquiry or strict observance of the *Agins* test. The first category includes cases where the owner's right to exclude others is compromised. When the government, either directly or indirectly, forces owners to suffer a physical occupation of their property there is a taking regardless of the magnitude of the occupation. (*Loretto v. Teleprompter*

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[5] This test can be conceptualized as consisting of two "prongs." For convenience, we refer to the first as the "government interest" prong, and the second the "economic" prong.

Manhattan CATV Corp. (1982) 458 U.S. 419, 430.) When a regulation forces an owner to provide access to the public as a condition for a building permit, such exaction is the functional equivalent of a physical occupation because it takes away the owner's right to exclude persons. (*Nollan v. California Coastal Comm'n.* (1987) 483 U.S. 825, 836-837; *Dolan v. City of Tigard* (1994) 512 U.S. 374, 393.) California has extended this principle to situations where the government exacts a fee from a landowner as a substitute for providing access. (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 883-884.) In these cases, the recognition of the property value of the right to exclude goes without serious question.

The second category includes cases where owners have been deprived of all economically beneficial uses of land where such denial is not within the government's police power to prohibit activities contrary to the public welfare. Laudable public purposes do not excuse the responsibility to pay for such deprivations. (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1019, 1022.) The holding in *Lucas* left open the possibility that a loss not amounting to deprivation may also satisfy the requirements for a taking regardless of the asserted governmental interest. (*Id.* at p. 1019, fn. 8.)

By established precedent, the Ordinance does not amount to either an actual or a constructive physical occupation of the park owner's land. (*Yee v. City of Escondido, supra,* 503 U.S. at p. 531.) Also, Berger's stipulation is not contending a deprivation of greater than or equal to "substantially all" economically viable use, necessarily forecloses a finding it was denied all economically viable use. Therefore, this case does not fit within either of the above described "categorical" takings, and is subject to the *Agins* test.

B. Conjunctive Versus Disjunctive Construction

Berger contends the court below and this court in the past have misconstrued the *Agins* test in the conjunctive rather than

the disjunctive (in other words, we substituted an "and" between the two prongs of the test for the "or" appearing in *Agins*). (*Del Oro Hills v. City of Oceanside* (1995) 31 Cal.App.4th 1060, 1079.) It urges us to reconsider our decision in *Del Oro Hills* in light of later federal authority (see *Del Monte Dunes at Monterey v. City of Monterey* (9th Cir. 1996) 95 F.3d 1422, 1428, 1430), and a recent rent control decision by our Supreme Court (*Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 774). It further contends if we were to apply the test from *Del Oro Hills*, the results in *Nollan*, *Dolan* and *Lucas* would have been different, demonstrating the fallacy in applying the test in the conjunctive. We do not reject Berger's argument; however, it is unnecessary to reach the issue of construction because we conclude Berger fails to establish a claim under either prong.

II

THE ECONOMIC PRONG

A. Substantially All Economically Viable Use

Berger correctly contends there has never been a United States Supreme Court case which has held a taking must deprive an owner of "substantially all economically viable use" of his or her property. Nevertheless, we are convinced the term expresses a view consistent with takings jurisprudence and which provides a reasonable guide to evaluating regulatory deprivations of less than all use of property.

In its ruling in *Agins*, the California Supreme Court held a zoning ordinance was constitutional unless it deprived the owner of "substantially all reasonable use of his property." (*Agins v. City of Tiburon* (1979) 24 Cal.3d 266, 277.) Because the United States Supreme Court found the question of taking was not close, it expressed no opinion on the above language. (*Agins v. Tiburon, supra*, 447 U.S. at p. 262.) Our Supreme Court now recognizes its characterization as dictum (*Kavanau v. Santa Monica Rent Control Bd., supra*, 16 Cal.4th at p. 769), and has

clearly stated, "[a] regulation, however, may effect a taking though, as is true here, it does not involve a physical invasion and leaves the property owner some economically beneficial use of his property." (*Id.* at p. 774.)

The earliest use of the precise term "substantially all economically viable use" in the context of a takings claim appears to come from the Ninth Circuit. (*Herrington v. Sonoma County* (9th Cir. 1987) 834 F.2d 1488, 1497.) The *Herrington* court presumably found the term implied in Supreme Court rulings in which a temporary loss of all use was found to be "substantial" (*First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304, 318), and an aggrieved landowner must establish a regulation has "in substance 'taken' his property" (*MacDonald, Sommer & Frates v. Yolo County* (1986) 477 U.S. 340, 348). The term has since been adopted with reference to *Herrington* by the Seventh Circuit (*Estate of Himelstein v. City of Fort Wayne, Ind.* (7th Cir. 1990) 898 F.2d 573, 576-577, fn. 4), and by the United States Court of Claims with reference to *First Lutheran* (*Dufau v. United States* (1990) 22 Cl.Ct. 156, 163). It has been implicitly recognized as a valid standard by the Federal Circuit. (*Tabb Lakes, Ltd. v. United States* (Fed. Cir. 1993) 10 F.3d 796, 799, 802.)

The first use of the term in a California case occurred in 1992 in a mobilehome park rent control case from the Second District, which specifically used the term in the context of the *Agins* test. (*Sandpiper Mobile Village v. City of Carpenteria* (1992) 10 Cal.App.4th 542, 550.) It was soon adopted by this court. (*Westwinds Mobile Home Park v. Mobilehome Park Rental Review Bd.* (1994) 30 Cal.App.4th 84, 95.) We have adhered to its use in several later opinions. (*Del Oro Hills v. City of Oceanside, supra*, 31 Cal.App.4th at pp. 1079-1080; *Thomsen v. City of Escondido* (1996) 49 Cal.App.4th 884, 893; *Yee v. Mobilehome Park Rental Review Bd.* (1998) 62 Cal. App.4th 1409.)

However the term is characterized, the fundamental meaning must of course be consonant with and faithful to established takings jurisprudence. We seek to define when a regulation "goes too far," and crosses the line at which a private party is being forced to bear "public burdens which, in all fairness and justice, should be borne by the public as a whole." (*Armstrong v. United States* (1960) 364 U.S. 40, 49; *Pennsylvania Coal Co. v. Mahon, supra*, 260 U.S. at p. 415.)

While we recognize we must rely "'as much [on] the exercise of judgment as [on] the application of logic'" (*MacDonald, Sommer & Frates v. Yolo County, supra*, 477 U.S. at p. 349, quoting *Andrus v. Allard* (1979) 444 U.S. 51, 65), we can neither ignore precedent, nor embark on an undirected analysis as if each takings case bears no resemblance to those which have gone before. Certainly, if the Ordinance took "all economically viable use" from Berger, there would have been a compensable taking. (*Lucas v. South Carolina Coastal Council, supra*, 505 U.S. at p. 1020.) It is also clear that Berger may retain "some use" of the property and still receive compensation. (*Kavanau v. Santa Monica Rent Control Bd., supra*, 16 Cal.4th at p. 774.) Whatever remains for Berger, if there is to be a taking substance" (*MacDonald, Sommer & Frates v. Yolo County, supra*, 477 U.S. at p. 348), the deprivation must be "substantial." Thus, we believe the term "substantially all economically viable use" provides a reasonably reliable measuring device in a regulatory takings case. Consequently, because Berger does not contend it has been denied that which we conclude to be the proper minimum measure of loss to establish a regulatory taking, and its contention cannot be logically construed to imply a denial of all economically viable use, it has failed to meet the economic prong of the *Agins* test.

B. Fair Return Analysis

Berger contends the trial court's reliance on its stipulation it was not contending it was denied a "fair return" as a basis for dismissing its suit is based on a "legal fantasy," because the

Ordinance does not list fair return as a factor for the Board's consideration and the fair return analysis should be applied only to public utilities, not private landlords. While we have some reservation about the court's belief the two prongs of the *Agins* test are "synthesized" into a fair return analysis, we nonetheless find fair return to be a relevant consideration in rent control cases generally, and to this case.

Berger is correct the Ordinance does not specifically require the Board to consider rate of return in its decisions, but the fact the Board directed its staff to prepare a rate of return analysis clearly indicates it believed rate of return to be relevant. (See *ante*, fn. 3.) We find no evidence in the record to indicate this was not a proper exercise of the Board's discretion.

We also find considerable support for the inclusion of fair return analysis in regulatory takings cases, including rent control. While the analysis in *Yee I* was confined to whether the Ordinance substantially advanced legitimate state interests, it was done so in the context of deciding whether the Ordinance effected a physical taking. (*Yee v. City of Escondido, supra*, 503 U.S. at pp. 530-531.) Contrary to Berger's contention, rate of return analysis is not limited to public utility cases. Application of fair return analysis in rent control predates *Yee I*. The United States Supreme Court "recognized that a legitimate and rational goal of price or rate regulation is the protection of consumer welfare. [Citations.] . . . Within this scheme, [the Ordinance] represents a rational attempt to accommodate the conflicting interests of protecting tenants from burdensome rent increases while at the same time ensuring that landlords are guaranteed *a fair return on their investment*." (*Pennell v. San Jose* (1988) 485 U.S. 1, 13, italics added.)

California has long recognized the importance of rate of return analysis in rent control cases. (*Birkenfield v. City of Berkeley* (1976) 17 Cal.3d 129, 165.) Recently, the California Supreme Court reiterated: "In the context of price control, which includes rent control, courts generally find that a regula-

tion bears 'a reasonable relation to a proper legislative purpose' so long as the law does not deprive investors a 'fair return' and thereby become 'confiscatory.' [Citation.]" (*Kavanau v. Santa Monica Rent Control Bd., supra*, 16 Cal.4th at p. 771.)

We reject, however, the trial court's assertion the *Agins* test becomes somehow "synthesized" into a single question whether the Ordinance provides the park owner a fair return. While City cites cases for the proposition a diminution in value does not alone establish a taking (see *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 686), or that a fair rate of return may negate a finding a taking has occurred (*Westwinds Mobile Home Park v. Mobilehome Park Rental Review Bd., supra*, 30 Cal. App.4th at p. 95; *Yee v. City of Escondido, supra*, 224 Cal. App.3d at pp. 1353-1354), in each the government interest prong was satisfied. Also, while we recognize a taking case differs from a pure Due Process case by focusing on the return rather than the process used in making the determination (*Kavanau v. Santa Monica Rent Control Bd., supra*, 16 Cal.4th at p. 776), the fair return inquiry is not an end in itself; it is merely the precursor to the question whether Berger was denied substantially all economically viable use of its property. Thus, because the court here did resolve the ultimate inquiry, we find any error in its perception of the *Agins* test was harmless.

III

THE GOVERNMENT INTEREST PRONG

A. The Proper Level of Scrutiny

Berger urges us to subject the Ordinance to heightened scrutiny of *Dolan* in light of our Supreme Court's decision in *Ehrlich*. (*Ehrlich v. City of Culver City, supra*, 12 Cal.4th at p. 876.) We agree a monetary exaction which may amount to "out-and-out [plan of] extortion" (*Nollan v. California Coastal Comm'n., supra*, 483 U.S. at p. 837) or a regulation which deprives an owner "all economically viable use" of its land (*Lucas v. South Carolina Coastal Council, supra*, 505 U.S.

at p. 1020) may require a reviewing court to subject such governmental action to higher than mere "rational basis" scrutiny. However, the California Supreme Court in *Ehrlich* declared:

> "[A]lthough we conclude that the combined test of *Nollan* and *Dolan* applies to the monetary exaction imposed by Culver City in this case, we also conclude that the heightened standard of scrutiny is triggered by a relatively narrow class of land use cases--those exhibiting circumstances which increase the risk that the local permitting authority will seek to avoid the obligation to pay just compensation. Neither *Nollan* nor *Dolan* is, after all, a conventional regulatory takings case. Rather, as the court's rationale for its result in *Nollan* demonstrates, both are cases in which the local government attached a condition to the issuance of a development permit which, but for the claim that the exaction is justified by the greater power to deny a permit altogether, would have amounted to an uncompensated requisition of private property." (*Ehrlich v. City of Culver City, supra*, 12 Cal.4th at p. 868.)

As we have stated *ante*, this case simply does not fit into the "narrow range of cases" defined in *Ehrlich*. First, Berger has not been denied all use of its property. It may still operate a mobilehome park and will continue to receive rent at a rate it does not contend is not a fair return. Further, City is not trying to exact money as a condition for the granting of any permit. Finally, it is not contended City is claiming any inherent right to deny Berger the right to engage in the rental of mobilehome spaces as justification for rent control. Indeed, in the absence of some extraordinary circumstances not present here, we doubt City could.

We are also persuaded by the decision in *Kavanau*, itself a rent control case:

> "When a regulation does not result in a physical invasion and does not deprive the property owner of all economic use of the property, a reviewing court must evaluate the regulation in light of the 'factors' the high court discussed in *Penn Central* [*Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104] and subsequent cases. [Citations.] . . . 'the nature of the State's interest in the regulation' [citations] . . . and, particularly, whether the regulation is 'reasonably necessary to the effectuation of a substantial public purpose' [citation]." (*Kavanau v. Santa Monica Rent Control Bd., supra*, 16 Cal.4th at p. 775.)

We believe the above statement stands as the last best enunciation of the proper level of scrutiny in rent control takings cases. Accordingly, we conclude the Ordinance need not be subject to a heightened *Dolan*-style level of scrutiny.

B. Evaluation under a "Reasonably Necessary" Standard of Review

When a rent control or other regulatory agency makes a quasi-adjudicative decision, "It]he proper inquiry is not into the subjective motive of the government agency, but whether there is, objectively, sufficient connection between the land use regulation in question and a legitimate governmental purpose so that the former may be said to substantially advance the latter." (*Landgate, Inc. v. California Coastal Com.* (1998) 17 Cal.4th 1006, 1022.) Thus, the proper role of this court is to look at the findings of the Board to determine whether they were based on substantial evidence. (*Ibid.*; Code Civ. Proc., § 1094.5; *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514-515.)

We note at the outset the United States Supreme Court has accepted the general validity of rent control as advancing a legitimate governmental purpose in much the same way as rate regulation. (*Pennell v. San Jose, supra*, 485 U.S. at pp. 12-13.)

Thus, there is a strong presumption in favor of the Ordinance's validity.

1. One Time Wealth Transfer

Berger contends its claim the continued application of the Ordinance resulted in a "one time wealth transfer to a politically favored group," raises the cost of housing rather than lowering it, in contravention of the stated goals of rent control. Further, it contends it is an "as applied" challenge to the Ordinance.

As to Berger's first point, we accept it may be able to prove such a "wealth transfer" does in fact occur and this fact "might have some bearing on whether the ordinance causes a regulatory taking. . . ." (*Yee v. City of Escondido, supra*, 503 U.S. at p. 530.) However, if such a claim is to be made in the context of an "as applied" taking, the focus would not be on whether the wealth transfer exists, but rather whether the rent increases provide a return sufficient to ameliorate the effects of this premium. (*Levald, Inc. v. City of Palm Desert* (9th Cir. 1993) 998 F.2d 680, 689.) Because Berger stipulates it does not contend it has been denied a fair return, we are unable to discern how such a wealth-transfer claim would inure to the benefit of its case.

Berger's other point is made in apparent recognition its claim must be an as applied challenge to the Ordinance, as a facial challenge would be subject to *res judicata* (see *Yee v. City of Escondido, supra*, 503 U.S. at p. 538), or fail for lack of standing or ripeness (see *Levald, Inc. v. City of Palm Desert, supra*, 998 F.2d at p. 689).

Two federal courts have rejected the notion a claim such as Berger's is an "as applied" challenge. (*Levald, Inc. v. City of Palm Desert, supra*, 998 F.2d at p. 689; *Carson Harbor Village Ltd. v. City of Carson* (9th Cir. 1994) 37 F.3d 468, 474, fn. 5, overruled on other grounds in *WMX Technologies, Inc. v. Miller* (9th Cir. 1997) 104 F.3d 1133, 1136.) A "facial" challenge arises solely from the existence of the Ordinance itself. (*Levald,*

Inc. v. City of Palm Desert, supra, 998 F.2d at p. 689.) Presumably, if the Ordinance were repealed, any "wealth transfer" would soon evaporate. We therefore conclude Berger's contention does indeed amount to a "facial" challenge, and is inappropriate for our consideration in this case.

2. City's "Scheme"

Berger forcefully contends it can establish the existence of a "scheme" by the Board to drive down the value of its property through the use of the Ordinance, and acquire the property which the City would then operate and subsidize the rents charged. As indicated *ante*, we are bound to accept the facts Berger alleges in its pleadings and opening statement. We briefly summarize them.

Before the enactment of the Ordinance, a memorandum favoring acquisition of mobilehome parks by condemnation had circulated within City administration. City also considered offering direct subsidies to mobilehome park residents. Later, it developed a "new, aggressive park acquisition policy" in which it would continue to operate the parks and use the rents collected to service the debt incurred in the purchases. A lone member of the Board directed City staff to investigate "mass acquisitions" of parks, and appraisals of one park calculated its value with and without rent control. The appraiser reported an owner "under duress" might sell at below appraised value. Later, City did purchase two parks for a total of $2 million below their appraised pre-rent control values. The purchase and sale agreements indicated the transactions took place "in lieu of the City's initiation of condemnation proceedings under its power of eminent domain."

Certainly, when the facts reasonably indicate an inappropriate motive has become an implemented policy which is clearly dictating action, we are bound to find the application of even a facially valid regulation no longer passes even the most relaxed scrutiny. (*Klopping v. City of Whittier* (1972) 8 Cal.3d

39, 46.) However, *Klopping* involved a clearly public pre-condemnation announcement which was directed at and led to the decline in the value of plaintiff's property and amounted to a "de facto taking." (*Id.* at p. 44.) Such de facto takings occur when there is a "physical invasion or direct legal restraint." (*Id.* at p. 46.) Likewise, where a zoning board has enacted a particularly harsh zoning regulation often calculatingly designed to decrease any future condemnation award, the government action cannot be considered reasonable, such as zoning a parcel located near a proposed airport runway to accommodate structures no higher than zero feet. (*Peacock v. County of Sacramento* (1969) 271 Cal.App.2d 845, 848.) Airport height restrictions, however, have long been construed as creating an airspace easement on the property. (*United States v. Causby* (1946) 328 U.S. 256, 261-262.)

We admit the facts suggest the possibility one or more individual members of the Board may have considered things which, if they had become part of a clearly established and identifiable Board policy, could give rise to the strong inference the rent increases did not substantially advance the purposes of the Ordinance. Nonetheless, we are required to evaluate the facts in light of the presumption of validity to which the Board's action is entitled. (*Kavanau v. Santa Monica Rent Control Bd., supra*, 16 Cal.4th at p. 773; *Coleman v. Paccarr Inc.* (1976) 424 U.S. 1301, 1306.) Further, the mere existence of a motive held by some members of a legislative body does not in and of itself suggest an improper purpose, has been adopted by the body as a whole. "The day is gone when this court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." (*Williamson v. Lee Optical of Oklahoma* (1955) 348 U.S. 483, 488.) Further, "[a] government may, absent extraordinary delay or deprivation of use of the land, engage in good faith planning activities and decisionmaking concerning the potential public use of a site (i.e., designate the

property as a site to be studied for possible public acquisition, designate a site for public purposes in a general plan, or commence eminent domain proceedings which are then abandoned), without being subject to an inverse condemnation action, even if the value of the land fluctuates during the process." (*Mira Development Corp. v. City of San Diego* (1988) 205 Cal.App.3rd 1201, 1220.) Thus, even though we acknowledge there are those in City government who spoke favorably of the "scheme" of which Berger complains, we conclude Berger's evidence would not show the Board's actions were improper.

Recently, in *Landgate, Inc. v. California Coastal Com., supra*, 17 Cal.4th at page 1022, the Supreme Court rejected a similar argument when receiving a development permit denial by the Coastal Commission claimed to be the outgrowth of a "jurisdictional spat" between the Commission and the County of Los Angeles. Noting the Commission's findings clearly articulated legitimate reasons for the denial, the Court concluded: "[W]e must determine not whether a sinister purpose lurked behind the Commission's decision, but rather whether the development restrictions imposed on the subject property substantially advanced some legitimate state purposes so as to justify the denial of the development permit." (*Id.* at p. 1022.)

Here, there is no doubt the Board's decision substantially advances the purpose of the Ordinance. Berger sought a rent increase of nearly $70, and the Board approved $16.12. The tenants at the Town and Country, especially those living on fixed incomes, were certainly benefited by such a limitation on rent increases on their spaces. The rent increase ultimately approved by the Board fell within the range of increases called for by its analytical methods, and was in fact at the high end of one of them. We therefore conclude the Board's decision was supported by substantial evidence and satisfies the government interest prong.

3. Subsumed Due Process

Berger lastly contends the court below accepted its theory of the case because it held the allegations of a "scheme" arguably stated a claim for due process, and such a cause of action would be subsumed into a takings case. Berger relies on a recent federal case to support its theory of subsumption. (*Armendariz v. Penman* (9th Cir. 1996) 75 F.3d 1311, 1326.) We reject this contention. In *Armendariz*, the property owners' buildings were shut down and they were eventually forced to surrender title to the local government. The question of a taking was never in doubt. (*Id.* at pp. 1314-1315.) We find nothing to indicate *Armendariz* should be extended to a regulatory takings case. (See *Kavanau v. Santa Monica Rent Control Bd., supra*, 16 Cal.4th at pp. 771-774.)

DISPOSITION

The judgment is affirmed.

WORK, Acting P.J.

I CONCUR:

HALLER, J.

BENKE, J. concurring.

I join in the conclusion of the majority affirming the decision of the trial court granting the City of Escondido's (City) motion for nonsuit. I do so, however, on the more limited ground that in stipulating the cause of action for administrative mandamus be dismissed, the parties ended H. N. & Frances C. Berger Foundation's (Berger) inverse condemnation claim as well.

Berger's opening brief contains the following statement: "On May 10, 1995, rather than augmenting the record as ordered by the court and proceeding to a writ hearing, the Rent Board vacated its decision of November 10, 1993, and conducted new hearings, ultimately concluding that a larger rent increase was

required to provide a fair return on the Town and Country. This action by the Board fully granted the relief sought by [Berger's] petition for administrative mandamus." (Fn. omitted.) According to Berger's brief, the parties then stipulated that the cause of action for administrative mandamus could be dismissed.

In *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 19, the court held that when an inverse condemnation claim is based on an allegation there has been a regulatory taking, the claimant must first challenge the regulation administratively, including prosecuting an administrative mandamus action, before pursuing a claim for damages. Having apparently determined that there is no valid basis to challenge the city's final resolution of its application for a rent increase, Berger cannot maintain a claim for damages on the basis of that decision.

Even if we ignore the bar *Hensler* presents, Berger's claim fails under *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 779-786, which holds that in the rent control setting, damages for inverse condemnation are not available because, even if a landlord can show that past controls were confiscatory, the rent regulatory body can remedy any temporary loss by granting future rent increases.

In light of my analysis I see no need to engage, as the majority does, in any extended discussion or application of *Agins v. City of Tiburon* (1979) 24 Cal.3d 266, 277. The test promulgated there respecting whether a taking must deprive an owner of "substantially all reasonable use of his property" (*ibid.*) has been repudiated in *Kavanau v. Santa Monica Rent Control Bd., supra,* 16 Cal.4th at page 769. Contrary to the majority's view, the Supreme Court in *Kavanau* did not relegate this test to dicta, free to be picked up again at the discretion of this court. Rather, the Supreme Court expressly concluded the test it had used in *Agins* was based upon a misinterpretation of federal constitutional requirements. (*Id.* at pp. 774-775.)

I do not believe we are in a position to quarrel with the high court's analysis of its own opinion.

BENKE, J.

Appendix B-1

Filed 11/24/98

Fourth Appellate District, Division One, No. D027377

S073664

IN THE SUPREME COURT OF CALIFORNIA

H.N. & FRANCES C. BERGER FOUNDATION, Appellant

v.

CITY OF ESCONDIDO Et Al., Respondents

Petition for review DENIED.

Baxter, J., Chin, J., and Brown, J., are of the opinion the petition should be granted.

/s/ GEORGE
Chief Justice

Appendix C-1

Filed 8/30/96

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO
NORTH COUNTY BRANCH

H.N. and FRANCES C. BERGER FOUNDATION,	)	Case No. N63317
	)	JUDGMENT
Petitioner/Plaintiff,	)	
v.	)	
CITY OF ESCONDIDO, et al.,	)	
Respondents/Defendants.	)	

The above-entitled cause came on regularly for trial on June 13, 1996 in Department M of the above-entitled Court, the Honorable Kenneth G. Ziebarth, Jr. presiding without a jury, and was heard on that date and on June 17, 1996.

R.S. Radford, Ronald St. John, and Mark Gallagher appeared as counsel for Petitioner/Plaintiff H.N. and Frances C. Berger Foundation ("Berger"), and Donald R. Lincoln, James C. Allen, and Linda Reich appeared as counsel for Respondents/Defendants City of Escondido, et al.[1]

---

[1] Respondents/Defendants also included Jerry Harmon, Sid Hollins, Richard A. Foster, Lori Holt Pfeiler, and Elmer Cameron, sued individually and as members of the City of Escondido's Mobilehome Rental Review Board. The Respondents/Defendants are hereinafter collectively referred to as "City."

Appendix C-2

On June 17, 1996 Berger made its Opening Statement. Thereafter City moved for a Judgment of Nonsuit.

The Court, heard and considered Berger's Opening Statement, Berger's and City's Amended Trial Briefs, City's Motion for Nonsuit and Berger's Opposition, the Stipulations entered into by the parties on April 8, 1996 and filed on June 10, 1996 the pleadings and record in this case, and the arguments of counsel.

The matter having been submitted for decision and the Court having previously dismissed all of Petitioner/Plaintiff Berger's causes of action except its claim for inverse condemnation and having issued its Statement of Decision, on August 19, 1996,

IT IS ADJUDGED THAT:

1. Respondents/Defendants City, et al.'s Motion for Nonsuit is granted;

2. Respondents/Defendants City, et al. recover Judgment against Petitioner/Plaintiff Berger;

3. Petitioner/Plaintiff Berger recover nothing from Respondents/Defendants City, et al.

4. Respondents/Defendants City et al. recover against Petitioner/Plaintiff Berger their costs in the amount of $___.

DATED: Aug 30 1996

/s/ KENNETH G. ZIEBARTH
HONORABLE KENNETH G. ZIEBARTH JR.
Judge of the Superior Court, Retired

Appendix C-3

Approved as to Form:

/s/ R. S. RADFORD
R.S. Radford
Ronald St. John
Mark Gallagher
Attorneys for Petitioner/Plaintiff
H.N. & Frances C. Berger Foundation

/s/ DONALD LINCOLN
Donald R. Lincoln
Linda B. Reich
James C. Allen
Attorneys for Respondents/Defendants
City of Escondido, et al.

Filed 8/19/96

SUPERIOR COURT

OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

NORTH COUNTY BRANCH

H.N. AND FRANCES C. BERGER FOUNDATION	)	Case No. N63317
	)	
	)	STATEMENT OF
Petitioner/Plaintiff,	)	DECISION RE CITY'S
v.	)	MOTION FOR
	)	NONSUIT
CITY OF ESCONDIDO, et al.,	)	
	)	
Respondents/Defendants.	)	
	)	

The above-entitled cause came on regularly for trial on June 13, 1996 in Department M of the above-entitled Court, the Honorable Kenneth G. Ziebarth, Jr. presiding without a jury, and was heard on that date and on June 17, 1996.

R.S. Radford, Ronald St. John, and Mark Gallagher appeared as counsel for Petitioner/ Plaintiff H.N. and Frances C. Berger Foundation ("Berger"), and Donald R. Lincoln, James C. Allen, and Linda Reich appeared as counsel for Respondents/ Defendants City of Escondido, et al.[1] ("City").

On June 17, 1996, Berger made its Opening Statement. Thereafter, City moved for a Judgment of Nonsuit pursuant to

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[1] Respondents/Defendants also included Jerry Harmon, Sid Hollins, Richard A. Foster, Lori Holt Pfeiler, and Elmer Cameron, sued individually and as members of the City of Escondido's Mobilehome Rental Review Board. The Respondents/Defendants are hereinafter collectively referred to as "City."

Code of Civil Procedure §581c pointing out that Berger failed to state a cause of action for an "as applied" regulatory taking challenge to a mobilehome space rent control ordinance because it failed to allege that it was denied a "fair return" or that it was denied "substantially all economically viable use of its property."

The Court, having considered Berger's Opening Statement, Berger's and City's Amended Trial Briefs, City's Motion for Nonsuit and Berger's Opposition, the Stipulations entered into by the parties on April 8, 1996 and filed on June 10, 1996, the pleadings and record in this case, and the arguments of counsel, and being fully advised:

The Court hereby grants City's Motion for Nonsuit based on the grounds that the only remaining cause of action in this lawsuit is one for an "as applied" regulatory taking, and it is clear from Berger's Opening Statement and the Stipulations entered into by the parties that the facts Berger intended to prove at trial did not state facts sufficient to state a cause of action for an "as applied" regulatory taking challenge to a mobilehome space rent control ordinance.

Although a Statement of Decision is not required in connection with a Nonsuit, the Court, having in mind that this proceeding will undoubtedly be appealed and pursuant to the agreement of the parties to such a procedure, directed counsel for the City to draft a Proposed Statement of Decision which incorporates all of the findings of facts and conclusions of law made by this Court in arriving at the Decision indicated above. Counsel for the City has since prepared such a document and Counsel for Berger has been given the opportunity to file written objections to same and to suggest additional findings of fact and conclusions of law.

After reviewing and considering the contents of all of the subsequent documents, this Court hereby issues the following Statement of Decision in this case:

A. The Court bases its decision on the following facts:

Appendix D-3

1. On June 7, 1988, the voters of the City of Escondido passed Proposition K ("the Ordinance"), an initiative ordinance which established mobilehome park space rent regulation in the City of Escondido. The Ordinance has been codified at section 29-101, et seq., of the Escondido Municipal Code ("EMC").

2. The Ordinance designated the City Council as the Mobilehome Rental Review Board ("Board"). EMC, §29-102(a). Pursuant to the Ordinance, all mobilehome space rents were "rolled back" to a "base rent," the rent in effect for the space on January 1, 1986. EMC, §29-103. To increase the rent, a park owner must obtain Board approval. EMC, §29-104(a). The Board must approve rent increases that are just, fair and reasonable, and must consider eleven listed factors and may consider any other factors it considers relevant. EMC, §29-104(g).

3. When the Ordinance was enacted, the property in question, the Town & Country Club Mobilehome Park ("Park"), was owned by Fairfield Homes, Inc. Berger first acquired ownership of the Park in December 1988.

4. On May 31, 1989, Berger filed a Complaint (*H.N. and Frances C. Berger Foundation v. City of Escondido*, San Diego Superior Court, N43874) for inverse condemnation and injunctive relief and damages. It alleges that the Ordinance constituted a "taking" of its property because it did not permit Berger to automatically raise space rents when a mobilehome was sold or transferred. As a second cause of action, it alleged that the Ordinance was unconstitutional because no emergency existed to justify its imposition.

5. On August 15, 1989 the Hon. Robert J. O'Neill, Judge of the San Diego Superior Court, issued an Order Granting the City's Demurrer and dismissing the action.

6. On August 31, 1989, Berger filed a Notice of Appeal. *H.N. and Frances C. Berger Foundation v. City of Escondido*, 4th Civ. No. D010769. Subsequently the *Berger* appeal was

consolidated with eleven similar suits *sub nom. Yee v. City of Escondido*, 4th Civ. No. D010307. In the consolidation, all parties agree to be bound by the *Yee* decision.

7. On October 31, 1990, the Court of Appeal issued its decision affirming the lower court dismissals. *Yee v. City of Escondido*, 224 Cal.App.3d 1349, 274 Cal.Rptr. 551 (1990).

8. Yee's Petition for Review to the California Supreme Court was denied. See 224 Cal.App.3d at 1362.

9. The United States Supreme Court granted certiorari and on April 1, 1992 unanimously affirmed the Court of Appeal decision in *Yee v. City of Escondido*, 503 U.S. 519, 112 S. Ct. 1522, 118 L.Ed.2d 153 (1992).

10. On February 1, 1991, approximately one week after the California Supreme Court had denied review in *Yee*, Berger filed a federal action (*H.N. and Frances C. Berger Foundation v. City of Escondido*, U.S. Dist. Ct., S.D. Cal. Case No. 91-0153 K (BTM)) which also contended that the Ordinance's lack of a vacancy decontrol provision constituted a "taking."

11. On June 12, 1991, the Honorable Rudi M. Brewster, United States District Judge, granted City's Motion to Dismiss, finding that Berger's federal action was barred by the res judicata effect of the prior decision in *Yee v. City of Escondido, supra*, 224 Cal.App.3d 1349.

12. On or about July 8, 1991, Berger filed a Notice of Appeal to the Ninth Circuit. Berger's appeal was consolidated with several other appeals, *sub nom. Vista Verde Limited, et al. v. City of Escondido*, 9th Cir. Docket No. 91-56101. On June 19, 1992 after the United States Supreme Court decision in *Yee*, that appeal was dismissed.

13. On December 11, 1991, Berger filed an application for a rent increase. Berger requested an average rent increase of $69.70 per space per month.

14. On November 10, 1993, the Board held a hearing and acted on Berger's application by granting a $10 per space per month rent increase.

15. On January 12, 1994, the Board issued a formal Resolution RRB 94-2 setting forth its findings in support of the $10 rent increase decision.

16. On February 7, 1994 Berger and Fairfield Homes, Inc. filed this action. After City demurred, on April 26, 1994, Berger filed an Amended Petition/Complaint in which Fairfield Homes, Inc. was no longer listed as a Petitioner/Plaintiff.

17. As a First Cause of Action, Berger sought a Writ of Administrative Mandamus pursuant to Code of Civil Procedure §1094.5 alleging that the Board's decision granting it a $10 rent increase was arbitrary and had denied Berger a fair return on its investment.

18. As a Second Cause Of Action, Berger alleged as follows:

SECOND CAUSE OF ACTION:
INVERSE CONDEMNATION

26. Petitioner realleges and incorporates by reference all allegations of Paragraphs 1 through 25 above.

27. As a direct and necessary result of respondents' application of the Rent Ordinance to the Town and Country, the Berger Foundation has suffered a regulatory taking of its private property for public use in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 19, of the California Constitution.

28. The effect of the Rent Ordinance as enacted and applied is to transfer certain discrete, valuable property interests from the Berger Foundation to individual coach owners who resided in the Town and Country at the time the Ordinance was enacted. The value of the property

interests at issue -- the right to occupy spaces in the Town and Country indefinitely while paying less than competitive market rents -- is converted into a cash premium and appropriated by residents of the Town and Country when these residents sell their mobile home coaches.

29. The application of the Rent Ordinance confers no comparable benefit to future park residents or to the population of Escondido as a whole. Indeed, by increasing the cash price of mobile home coaches sited in the Town and Country, the Rent Ordinance raises the cost of housing to all subsequent park residents. This result is directly contrary to the asserted purpose of the ordinance, preserving affordable mobile home housing.

30. The Rent Ordinance as enacted and applied has deprived the Berger Foundation of one of the most essential attributes of ownership of the Town and Country, *i.e.*, the right to determine the terms upon which possession of Petitioner's real property will be alienated.

31. The Rent Ordinance as applied to the Berger Foundation fails to substantially advance any legitimate governmental interest and in fact contravenes its own goals. The Rent Ordinance therefore constitutes a regulatory taking of the foundation's property for public use.

32. The Berger Foundation has received no compensation for the regulatory taking of its property, and the Rent Ordinance contains no provision for seeking or obtaining just compensation.

33. Petitioner does not have a plain, speedy, or adequate remedy in the ordinary course of the law other than the relief requested herein. Petitioner has exhausted all administrative remedies required by law; this action is ripe for adjudication and is timely filed.

19. As a Third Cause of Action Berger challenged the City's authority to regulate rents and sought declaratory relief that the Ordinance should not be applied to Berger.

20. As a Fourth Cause of Action, Berger sought injunctive relief to prevent City from enforcing the provisions of the Ordinance against Berger.

21. City demurred to all but the First (Writ of Administrative Mandamus) Cause of Action and, on June 29, 1994, the Court sustained City's Demurrer to the Third Cause of Action for Declaratory Relief without leave to amend but overruled City's Demurrers as to the Second and Fourth Causes of Action.

22. On July 14, 1994, City answered denying the primary allegations in the Petition/Complaint and raising various affirmative defenses.

23. On January 31, 1995, the Superior Court granted City's Motion that the First Cause of Action seeking a Writ of Administrative Mandamus challenging the $10 rent increase be heard prior to Berger's inverse claim.

24. On February 18, 1995, Berger filed a Petition for Writ of Mandate with the appellate court challenging that Order. On March 9, 1995, the Court of Appeal denied Berger's Writ and Request for Stay without opinion.

25. On March 7, 1995, the Superior Court issued an Order, which among other items, granted Berger's motion to augment the administrative record and "remand[ed] this matter to the Mobilehome Rent Control Board to hear this evidence."

26. In response to the remand Order, the Board decided to vacate its $10 rent decision and rehear the entire matter.

27. After hearings on May 10 and May 24, 1995, the Board granted Berger a $16.12 per month per space rent increase (or $6.12 more than its prior decision). In addition, after noting that there had been a 17-month delay between its

first and second decisions, the Board approved an additional $6.40 per month per space rent increase for the next 17 months.

28. On June 7, 1995, the Board formally approved its May 24, 1995, $16.12 and $6.40 rent decisions in Resolution No. RRB 95-2.

29. On June 21, 1995, the City filed its Response to the Court's March 7, 1995 Order inciuding a copy of Resolution No. RRB 95-2.

30. On or about June 28, 1995, Berger filed a Motion for Summary Adjudication of its First (Writ of Administrative Mandamus) Cause of Action.

31. On August 24, 1995, the Superior Court via telephonic ruling denied Berger's Motion, holding that "[b]ecause the Board had officially set aside its November 10, 1993 final determination, has conducted new hearings, and has reached a determination more favorable to Petitioner" the First Cause of Action for a Writ of Administrative Mandamus was "moot."

32. On November 9, 1995, the Court denied City's Motion for Judgment on the Pleadings as to the Second and Fourth Causes of Action and denied City's request for Summary Judgment or Adjudication as to the Second Cause of Action for inverse condemnation. The Court did, however, grant Summary Adjudication as to the Fourth Cause of Action, holding that because the injunctive relief requested was "adjunct" to the relief requested in the First (Writ) Cause of Action it was also "moot."

33. On February 5, 1996, the Court formally dismissed the First (Writ of Administrative Mandamus) and Third (Declaratory Relief) Causes of Action.

34. As a result of these rulings, the only cause of action remaining in this case was the Second Cause of Action for an "as applied" regulatory taking (inverse condemnation).

35. On April 8, 1996, the parties entered into the following stipulations:

> IT IS HEREBY AGREED AND STIPULATED among the parties to this action, by and through their attorneys of record, for purposes of trial in Case No. N63317, that:
>
> 1. The market value of the Town and Country Club Park under the Rent Ordinance is less than it would be in the absence of the Rent Ordinance.
>
> 2. But for defendants' application of the Rent Ordinance, the Berger Foundation would have implemented rent increases at the Town and Country averaging more than $10.00 per space in December, 1991.
>
> 3. For purposes of case No. N63317, the Berger Foundation does not contend that it has been denied a "fair return" on the Town and Country.
>
> 4. For purposes of case No. N63317, the Berger Foundation does not contend that it has been denied "substantially all economically viable use of its land."

36. On June 10, 1996, the above Stipulation was filed with the Court.

37. On June 10, 1996, City informed the Court that it intended to move for Nonsuit after Berger's Opening Statement and, at the Court's suggestion and without objection from Berger, City filed its Motion for Nonsuit, including a Memorandum of Points and Authorities.

38. On June 13, 1996, Berger filed its Opposition to City's Motion for Nonsuit and the parties engaged in preliminary oral argument.

39. On June 14, 1996, Berger filed citations to Additional Authorities in Opposition to Defendants' Motion for Nonsuit.

40. On June 17, 1996, Berger's counsel presented Berger's Opening Statement in the form of a 14-page written document, which it filed with the Court.

41. In its Opening Statement, Berger argued that the Ordinance as applied to its specific property did not substantially advance a legitimate governmental interest and therefore constituted a regulatory taking. Berger emphasized that this case did *not* involve the issue of whether or not it had received a "fair return" on its property but instead argued that it could establish a regulatory taking based solely on evidence that the Ordinance's application did not advance a legitimate state interest.

After contending that the Court must apply a "heightened standard of review" and pointing out that the Ordinance itself was "silent concerning the purposes it is intended to advance," Berger set forth three legal theories in support of its argument that the Ordinance did not advance a legitimate state interest.

First, Berger contended that the Board, as an entity and without reference to the actions of any individual Board member, had unreasonably delayed acting on Berger's rent increase application; had ignored factors which would have supported a greater rent increase; had considered a rate of return analysis which was not a factor specifically enumerated in the Ordinance; that the Board staff member who had prepared a rate of return analysis had primarily relied upon legal advice and had never previously prepared such an analysis; and that the Board had considered the rate of return analysis without allowing further public comment prior to reaching its $10 rent increase decision in November 1993, and that such actions by themselves were sufficient to establish an "as applied" regulatory taking.

Second, Berger contended that the City's application of the Ordinance had maintained the value of the "premium" on the sale of their mobilehomes which had been transferred to the

mobilehome owners who had occupied its Park when the Ordinance was enacted due to its lack of a vacancy decontrol provision. Berger further contended that the application of rent ordinances like Escondido's had led to a decline in the shipment of mobilehomes into California and that since the Ordinance was enacted the supply of mobilehome spaces in Escondido had decreased. Berger further contended that the Ordinance's application had reduced the supply of affordable housing to all Californians; and that the lack of a nexus between the effect of the Ordinance and its legitimate objective was sufficient to support a claim for a regulatory taking.

Finally, Berger contended that the City's implementation of its Ordinance was designed to drive down the value of all mobilehome parks in Escondido to facilitate their acquisition by City; that City had purchased two other mobilehome parks at prices below their fair market value without rent control; and that this use of the Ordinance also independently supported Berger's claims for a regulatory taking.

42. At the close of Berger's Opening Statement, counsel for City orally reiterated the Motion for Nonsuit.

43. After City's Motion for Nonsuit was made, the Court gave Berger's counsel full opportunity to amend or modify its Opening Statement to state all facts Berger intended to prove before the Court ruled on the motion. Berger's attorneys declined to make any such amendment or modification of its Opening Statement but instead decided to stand on its Opening Statement as presented in its written statement.

B. The Court bases its decision on the following Conclusions of Law:

1. The only cause of action remaining in this proceeding is inverse condemnation for an alleged regulatory taking based on the application of the Ordinance to Berger's Park.

2. In *Agins v. Tiburon* ("Agins"), 447 U.S. 255, 260, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), the Supreme Court held that where there is a claim for a regulatory taking only two issues need to be resolved: Was the property owner deprived of substantially all economically viable use of the property? Did the Ordinance advance a legitimate state interest?

3. By stipulating that it was not contending that it had been denied all economically viable use of its property, Berger could not meet *both* elements of the *Agins* test and therefore could not establish a regulatory taking. See *Del Oro Hills v. City of Oceanside,* 31 Cal.App.4th 1060, 1079, 37 Cal.Rptr.2d 677 (1995), *cert. denied*, __ U.S. __, 116 S. Ct. 86, 133 L.Ed.2d 43 (1995) ("[T]he United States Supreme Court's analysis of the taking issue inextricably interlinked both the regulation's validity and the question of whether any economically beneficial use of the property remained in light of the regulation").

4. In any event, in a mobilehome space rent control "as applied" regulatory taking case, the two issues stated in *Agins* are synthesized into a single issue: Did the park owner receive a fair return? See *Westwinds Mobilehome Park v. Mobilehome Park Rental Review Board* ("Westwinds"), 30 Cal.App.4th 84, 95, 35 Cal.Rptr.2d 315 (1994) ("There is no ["as applied"] taking unless the ordinance deprives the property owner of substantially all economically viable uses for his land. [Citation] Here, whether Owner is deprived of a fair return depends . . . on whether the rent increase granted under the ordinance will permit Owner a fair return on its investment . . .").

Since Berger has stipulated that it is not contending that it has been denied a "fair return on Town & Country" nor that it has been denied "substantially all economically viable uses of its land," it cannot state a cause of action for an "as applied" regulatory taking.

5. The Courts have previously rejected park owner arguments that this Ordinance and other similar mobilehome

rent ordinances do not advance legitimate state interests. See *Westwinds*, *supra*, 30 Cal.App.4th at 95 & n. 7; *Yee v City of Escondido, supra*, 224 Cal.App.3d at 1353-54; see also *Sandpiper Mobile Village v. City of Carpinteria* ("Sandpiper"), 10 Cal.App.4th 542, 550-51, 12 Cal.Rptr.2d 623 (1992), *cert. denied*, 507 U.S. 1032, 113 S. Ct. 1850, 123 L.Ed.2d 473 (1993); *Casella v. City of Morgan Hill*, 230 Cal.App.3d 43, 56-57, 280 Cal.Rptr. 876 (1991), *cert denied*, 503 U.S. 983, 112 S.Ct. 1665, 118 L.Ed.2d 387 (1992); *Oceanside Mobilehome Park Owners Ass'n v. City of Oceanside*, 157 Cal. App.3d 887, 897, 204 Cal.Rptr. 239 (1984).

6. In any event, this mobilehome rent regulation case does not "trigger" the *Nollan/Dolan* "heightened standard of scrutiny" because it is not one of the "relatively narrow class of land use cases" exhibiting circumstances which increase the risk that the local authority will seek to use its regulatory power to avoid the obligation to pay just compensation. See *Erhlich v. City of Culver City*, 12 Cal.4th 854, 868, 50 Cal.Rptr.2d 242 (1996); see also, *Westwinds, supra*, 30 Cal.App.4th 95 (questioning whether "heightened scrutiny" applies to this type of case).

7. The fact that a rent control ordinance may result in a diminution in value does not constitute a taking unless the owner has been deprived of substantially all economically viable use of his property. See, *Sandpiper, supra*, 10 Cal.App.4th at 550. Here, since Berger has stipulated it is not contending that it had been denied "all economically viable use of its property," the fact that the market value of Berger's park may be less than it would be in the absence of the Ordinance does not establish an "as applied" regulatory taking.

8. Berger's contentions concerning the alleged conduct by the Board and its staff, while arguably relevant to a Writ of Administrative Mandamus action or a due process challenge, is insufficient to establish an "as applied" regulatory taking not only because the Board subsequently held a new hearing and

granted Berger a higher rent increase "mooting" Berger's Writ action, but also because Berger does not contend that the Board's decision denied it a "fair return" nor denied it "substantially all economically viable use of its land."

9. Berger's contentions that the alleged "premium" given to the existing residents by the Ordinance's lack of a vacancy decontrol provision is being "maintained" by the City's "application" of its Ordinance is in fact a "facial claim" rather than an "as applied" regulatory taking claim. See *Levald v. City of Palm Desert* ("Levald"), 998 F.2d 680, 689 (9th Cir. 1993) *cert. denied*, _ U.S. _, 114 S. Ct. 924, 127 L.Ed.2d 217 (1994) ("It is not a particular *application* of the statute that gives rise to the premium; the premium arises from the existence of the statute itself").

Such a facial taking claim is barred by applicable statutes of limitations (*Levald*, *supra*, 998 F.2d at 686-89); by Berger's "lack of standing" to facially challenge the Ordinance (see, *e.g.*, *Carson Harbor Village Ltd. v City of Carson* ("Carson Harbor"), 37 F.3d 468, 476-77 (9th Cir. 1994) (property owner had no standing to facially challenge the "premium" granted by a mobilehome rent control ordinance because it did not own the property at the time the ordinance was enacted); by res judicata/collateral estoppel based on the dismissal of Berger's prior taking challenges to this same Ordinance (see, *e.g.*, *H.N and Frances C. Berger Foundation v. City of Escondido*, U.S. Dist. Ct. S.D. Cal., Case No. 91-0153K (BTM) (prior federal facial taking challenge to Ordinance dismissed based on res judicata effect of *Yee, supra*, 224 Cal. App.3d 1349)), and because such a challenge fails to state a facial regulatory taking claim. See, *e.g.*, *Sandpiper, supra*, 10 Cal.App.4th at 549-51.

10. Berger's contentions concerning an alleged decline in the shipment of mobilehomes into California and a decline in the number of mobilehome spaces in Escondido does not support an "as applied" regulatory taking claim as to Berger's property,

especially in light of the fact that Berger is not claiming that *it* did not receive a "fair return."

11. Since Berger does not allege that it has ever attempted to sell *its* park (see Berger's Opposition to Motion for Nonsuit at 8) and has stipulated that *it* is not claiming that *it* did not receive a "fair return," it has no standing to argue that the City's application of the Ordinance was designed to drive down the value of mobilehome parks to facilitate their acquisition by the City or that *other* parks were acquired by the City at less than their fair market value. See *Carson Harbor, supra*, 37 F.3d at 475 (park owner's "as applied" taking challenge to conversion law was unripe where it "had not taken any measures indicating a present intention to sell or convert its property"); *Yee, supra*, 118 L.Ed.2 at 165-166 (same).

12. The above appellate court decisions, including especially *Westwinds, supra,* are binding on this Court on the issue of regulatory takings in a mobilehome space rent regulation context. See *Auto Equity Sales v. Superior Court*, 57 Cal.2d 450, 455, 20 Cal.Rptr. 321 (1962)

13. Since Berger does not allege any specific wrongful actions by any of the individually named Respondents/ Defendants (Jerry Harmon, Sid Hollins, Richard A. Foster, Lori Holt Pfeiler, and Elmer Cameron), it fails to state a cause of action against them in their individual capacities. In any event, an inverse condemnation claim can only proceed against a public entity or a private party which has authority to exercise the power of eminent domain. None of the named individual Respondents/Defendants are public entities or private parties with such authority in their individual capacities.

Counsel for the City is hereby directed to prepare forthwith a Judgment which is consistent with the contents hereof, submit same to opposing counsel for approval as to form, and then submit same to this Court for signature, filing, and entry.

DATED: Aug 19, 1996.

/s/ KENNETH G. ZIEBARTH
HON. KENNETH G. ZIEBARTH, JR.
JUDGE OF THE SUPERIOR COURT, RETIRED

* RETIRED JUDGE OF THE SUPERIOR COURT
SITTING UNDER ASSIGNMENT OF THE
CHAIR PERSON OF THE JUDICIAL COUNCIL

Appendix E-1

Effective 7/8/88

AN ORDINANCE OF THE CITY OF ESCONDIDO ESTABLISHING MOBILEHOME RENT PROTECTION

1. Definitions. For the purposes of this ordinance, the following words, terms, and phrases shall be defined as follows:

   (a) Board shall mean the Mobilehome Park Rental Review Board of the City of Escondido.

   (b) Capital improvement shall mean the installation of new improvements and facilities and/or the replacement or reconstruction of existing improvements and facilities which consist of more than ordinary maintenance and/or repairs.

   (c) *Department shall mean the Community Development Department of the City of Escondido.

   (d) Mobilehome shall mean a vehicle designed and equipped for human habitation and which is used as the principal place of habitation for the occupants thereof.

   (e) Mobilehome park shall mean any area of land within the City of Escondido where two (2) or more mobilehome spaces are rented, or held out for rent, to accommodate mobilehomes used for human habitation.

   (f) Mobilehome space shall mean the site within a mobilehome park intended, designed, or used for the location or accommodation of a mobilehome and any accessory structures or appurtenances attached thereto or used in conjunction therewith.

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* For clarification, Rent Review is administered by the Community Services Department and all questions should be directed to them.

(g) Owner shall mean the owner or operator of a mobilehome park or an agent or representative authorized to act on said owner's or operator's behalf in connection with the maintenance or operation of such park.

(h) Rehabilitation work shall mean any renovation or repair work completed on or in a mobilehome park which was performed in order to comply with the direction or order of a public agency, or to repair damage resulting from fire, earthquake, or other casualty.

(i) Rent shall mean the consideration paid for the use or occupancy of a mobilehome space.

(j) Rental increase shall mean any increase in rent charged by an owner to a tenant, including but not limited to lease offers, lease renewal offers, and increase in monthly rents.

(k) Tenancy shall mean the right of a tenant to use or occupy a mobilehome space.

(l) Tenant shall mean a person who has a tenancy in a mobilehome park.

2. The Mobilehome Park Rental Review Board.

(a) The City Council of the City of Escondido shall serve as the Mobilehome Park Rental Review Board.

(b) The Board shall establish the time of any hearings or meetings held pursuant to this Ordinance and such hearings or meetings shall be held in the City Hall as often as the Board determines to be necessary to discharge its duties hereunder.

(c) Three (3) members shall constitute a quorum for the purpose of conducting a hearing or meeting. Decisions of the Board shall be made by a majority vote of the members present.

(d) The duties and responsibilities of the Board shall include the hearing of all rent increase applications and determine either to approve or disapprove a rent increase in the manner provided for herein.

3. Base Rent. Except as hereinafter provided, an owner shall not demand, accept, or retain rent for a mobilehome space exceeding the rent in effect for said space on January 1, 1986. If a previously rented mobilehome space was not rented on January 1, 1986, the owner shall not demand, accept or retain for said space exceeding the rent in effect during the last month the space was rented prior to January 1, 1986. If a mobilehome space is rented for the first time after January 1, 1986, the owner shall not demand, accept, or retain rent for said space exceeding the rent first charged for the space. No owner shall send it notice containing the specific amount of a proposed rental increase prior to receiving approval of a rent increase from the Board. Except as herein provided, an owner shall not demand, accept or retain rent exceeding the rent in effect on January 1, 1986, for a mobilehome space that was not regulated by this section prior to January 1, 1986. If such mobilehome space was not rented on January 1, 1986, the owner shall not demand, accept or retain rent for said space exceeding the rent in effect during the last month the space was rented prior to January 1, 1986.

4. Permitted Rent Increases Based Upon an Application Approved by the Board.

(a) An owner may file with the Department a rent increase application for one or more mobilehome spaces for approval by the Board.

(b) An application for a rent increase pursuant to this section shall be filed upon a form prescribed by the Department and shall be accompanied by the payment of a fee which will be determined by the Board;

provided, however, that no fee shall be charged for applications filed within the first one hundred eighty (180) days after the effective date of this Ordinance. Said application shall specify the address of the mobilehome park, the space number or numbers for which rent is requested to be increased, the amount of the requested rent increase, and the facts supporting the requested increase. The applicant shall produce at the request of the Department any records, receipts, reports, or other documents that the Department may deem necessary for the Board to made a determination whether to approve a rent increase. The application shall be made under penalty of perjury and supporting documents shall be certified or verified as requested by the Department.

(c) Upon receipt of a rent increase application, the Department shall mail a notice to the affected tenants at the mobilehome spaces designated in the application, informing them of the receipt of such application, the amount of the requested rent increase, a brief summary of the owner's justification for the request, any supporting documents which may be inspected at the City Hall, the tenant's right to submit written statements, photographs or other documents relating to the application within thirty (30) days after the date the notice is mailed, and the address where such statements or documents may be mailed or delivered.

(d) The Department shall determine within thirty (30) days after receipt of a rent increase application whether said application is complete. If the Department determines that said application is not complete, it shall notify the applicant in writing as to what additional information is required.

(e) A copy of each rent increase application shall be provided to each member of the Board after such

application is determined to be complete. The Board shall hold a hearing on said application within sixty (60) days after such determination is made except as provided in subsection (i). Notice of the time, date, and place of the hearing shall be mailed to the applicant and the affected tenants at the mobilehome spaces designated in the application at least ten (10) days prior to the hearing.

(f) At the hearing, the applicant and the affected tenants may offer any testimony that is relevant to the requested rent increase. The applicant and affected tenants may offer documents, written declarations, or other written evidence for the first time at the hearing only if good cause is shown why such evidence was not filed with the Department prior to the hearing. Formal rules of evidence shall not be applicable to such proceedings. Except as provided in subsection (j), within fifteen (15) days after the close of the hearing, the Board shall make its determination, pursuant to the standards established by subsection (g) of this section, approving or disapproving a rent increase for the mobilehome space or spaces specified in the rent increase application.

(g) The Board shall approve such rent increase as it determines to be just, fair and reasonable. The Board shall consider the following factors, in addition to any other factors it considers relevant, in making such determination:

(1) Changes in the Consumer Price Index for All Urban Consumers in San Diego Metropolitan Area published by the Bureau of Labor Statistics.

(2) The rent lawfully charged for comparable mobilehome spaces in the City of Escondido.

(3) The length of time since either the last hearing and final determination by the Board on a rent

increase application or the last rent increase if no previous rent increase application has been made.

(4) The completion of any capital improvements or rehabilitation work related to the mobilehome space or spaces specified in the rent increase application, and the cost thereof, including such items of cost, including materials, labor, construction interest, permit fees, and other items as the Board deems appropriate.

(5) Changes in property taxes or other taxes related to the subject mobilehome park.

(6) Changes in the rent paid by the applicant for the lease of the land on which the subject mobilehome park is located.

(7) Changes in the utility charges for the subject mobilehome park paid by the applicant and the extent, if any, of reimbursement from the tenants.

(8) Changes in reasonable operating and maintenance expenses.

(9) The need for repairs caused by circumstances other than ordinary wear and tear.

(10) The amount and quality of services provided by the applicant to the affected tenant.

(11) Any existing written lease lawfully entered into between the applicant and the affected tenant.

(h) The Board may provide that an increase in rent or a portion of an increase in rent granted by the Board be limited to the length of time necessary to allow the park owner to reasonably amortize the cost of a capital improvement including interest. Such increase granted as a result of the capital improvement shall not continue

beyond the time necessary for reasonable amortization of the cost of such improvement.

(i) Notice of the Board's determination shall be mailed to the applicant and all affected tenants at the mobilehome spaces designated in the application. The determination of the Board shall be final.

(j) In the event that the Board is unable to act and make its final determination on a completed rent increase application within the time limitations prescribed by subsection (d)-(f) of this Section, and after the thirty (30) days for the tenant to file statements or documents in opposition to the application under subsection (c) shall have expired, the Board may approve such interim increase for the mobilehome space or spaces specified in said application which clearly appears to be warranted when the factors set forth in subsection (g) of this Section are considered, based upon the facts stated in the application, any written statements or documents filed with the Department by the affected tenants, and any other facts known to the Board. An approved interim rent increase shall expire on either (1) the last day of the month within which the Board makes its final determination disapproving a rent increase, or (2) the effective date of a rent increase which is approved by a final determination of the Board.

(k) The time within which the Board my conduct a hearing as provided in subsection (c) or make its determination as provided in subsection (f) may be extended twice by the Board for periods of time not to exceed sixty (60) days each if the Board approves an interim rent increase pursuant to subsection (j).

5. Fees. A tenant whose tenancy is not regulated by the provisions of the Mobilehome Residency Law shall not be charged a fee for anything other than rent or utilities with the

exception of incidental reasonable charges for services actually rendered.

6. Permissible Reasons for Terminating or Refusing to Renew a Tenancy.

(a) A tenancy which is not subject to the provisions of the Mobilehome Residency Law shall not be terminated nor shall its renewal be refused, except for one or more of the following reasons:

(1) Failure of the tenant to comply with a local ordinance or State law or regulation relating to mobilehomes within a reasonable time after the tenant receives a notice of noncompliance from the appropriate governmental agency.

(2) Conduct by the tenant, upon the mobilehome park premises, which constitutes a substantial annoyance to other tenants.

(3) Failure of the tenant to comply with reasonable rule or regulation of the mobilehome park. No act or omission of the tenant shall constitute such failure to comply unless and until the owner has given the tenant written notice of the alleged rule or regulation violation and the tenant has failed to adhere to the rule or regulation within seven (7) days.

(4) Nonpayment of rent, utility charges, or reasonable incidental service charges.

(5) Condemnation of the mobilehome park.

(6) Change of use of the Mobilehome Park, provided that the provisions of subsection (f) of Section 79856 of the California Civil Code are followed.

(a) The owner gives the tenant written notice of the proposed change twelve (12) months or more before the date of the proposed change.

(b) The owner gives each proposed tenant whose tenancy will commence within twelve (12) months of the proposed change written notice thereof prior to the inception of his tenancy. (b) Notice of termination or refusal to renew must be given in writing in the manner prescribed by Section 1162 of the Code of Civil Procedure at least sixty (60) days prior to the termination date of the tenancy. Said notice shall state the date the tenancy terminates, the reason for the termination or refusal to renew, and the specific facts upon which the owner is relying.

7. Refusal of Tenant to Pay Illegal Rent. A tenant may refuse to pay any rent in excess of the maximum rent permitted by this Ordinance. The fact that such unpaid rent is in excess of the minimum rent shall be a defense in any action brought to recover possession of a mobilehome space for nonpayment of rent or to collect the illegal rent

8. Remedies.

(a) Any person who demands, accepts or retains any payment of rent in violation of the provisions of this ordinance shall be liable in a civil action to the person from whom such payment is demanded, accepted or retained for damages in the sum of three (3) times the mount by which the payment or payments demanded, accepted, or retained exceed the maximum rent which could be lawfully demanded, accepted, or retained together with reasonable attorney's fees and costs as determined by the Court.

(b) Any person violating any of the provisions of this Ordinance shall be guilty of a misdemeanor and shall be punishable in the manner provided by Section 1-13 of the Escondido Municipal Code.

9. Severability. If any section, subsection, sentence, clause, phrase or portion of this Ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such decision shall not affect the validity of the remaining portion thereof.

*30319 West's Ann.Cal.Civ.Code § 798
EXCERPTS

WEST'S ANNOTATED CALIFORNIA CODES
CIVIL CODE
DIVISION 2. PROPERTY
PART 2. REAL OR IMMOVABLE PROPERTY
TITLE 2. ESTATES IN REAL PROPERTY
CHAPTER 2.5. MOBILEHOME RESIDENCY LAW
ARTICLE 1. GENERAL

§ 798. Citation of chapter

This chapter shall be known and may be cited as the "Mobilehome Residency Law."

ARTICLE 6. TERMINATION OF TENANCY

§ 798.55. Protection from actual or constructive eviction; termination or refusal to renew; reasons; notice; time

(a) The Legislature finds and declares that, because of the high cost of moving mobilehomes, the potential for damage resulting therefrom, the requirements relating to the installation of mobilehomes, and the cost of landscaping or lot preparation, it is necessary that the owners of mobilehomes occupied within mobilehome parks be provided with the unique protection from actual or constructive eviction afforded by the provisions of this chapter.

(b) The management shall not terminate or refuse to renew a tenancy, except for a reason specified in this article and upon the giving of written notice to the homeowner in the manner prescribed by Section 1162 of the Code of Civil Procedure, to remove the mobilehome from the park within a period of not less than 60 days, which period shall be specified in the notice. A copy of this notice shall be sent to the legal owner, as defined in Section 18005.8 of the Health and Safety Code, each junior lienholder, as defined in Section 18005.3 of the Health and

Safety Code, and the registered owner of the mobilehome, if other than the homeowner, by United States mail within 10 days after notice to the homeowner. The copy may be sent by regular mail or by certified or registered mail with return receipt requested, at the option of the management. If the homeowner has not paid the rent due within three days after notice to the homeowner, and if the first notice was not sent by certified or registered mail with return receipt requested, a copy of the notice shall again be sent to the legal owner, each junior lienholder, and the registered owner, if other than the homeowner, by certified or registered mail with return receipt requested within 10 days after notice to the homeowner. Copies of the notice shall be addressed to the legal owner, each junior lienholder, and the registered owner at their addresses, as set forth in the registration card specified in Section 18091.5 of the Health and Safety Code.

***30451 West's Ann.Cal.Civ.Code § 798.73**

ARTICLE 7. TRANSFER OF MOBILEHOME OR MOBILEHOME PARK

§ 798.73. Removal upon sale to third party; conditions

The management shall not require the removal of a mobilehome from the park in the event of its sale to a third party during the term of the homeowner's rental agreement. However, in the event of a sale to a third party, in order to upgrade the quality of the park, the management may require that a mobilehome be removed from the park where:

(a) It is not a "mobilehome" within the meaning of Section 798.3.

(b) It is more than 20 years old, or more than 25 years old if manufactured after September 15, 1971, and is 20 feet wide or more, and the mobilehome does not comply with the health and safety standards provided in Sections 18550, 18552, and 18605 of the Health and Safety Code and the regulations established thereunder, as determined following an inspection by

the appropriate enforcement agency, as defined in Section 18207 of the Health and Safety Code.

(c) The mobilehome is more than 17 years old, or more than 25 years old if manufactured after September 15, 1971, and is less than 20 feet wide, and the mobilehome does not comply with the construction and safety standards under Sections 18550, 18552, and 18605 of the Health and Safety Code and the regulations established thereunder, as determined following an inspection by the appropriate enforcement agency, as defined in Section 18207 of the Health and Safety Code.

(d) It is in a significantly rundown condition or in disrepair, as determined by the general condition of the mobilehome and its acceptability to the health and safety of the occupants and to the public, exclusive of its age. The management shall use reasonable discretion in determining the general condition of the mobilehome and its accessory structures. The management shall bear the burden of demonstrating that the mobilehome is in a significantly rundown condition or in disrepair. The management of the park shall not require repairs or improvements to the park space or property owned by the management, except for damage caused by the actions or negligence of the homeowner or an agent of the homeowner.

***30454 West's Ann.Cal.Civ.Code § 798.74**

§ 798.74. Prior approval of purchaser; grounds for withholding; financial information; notice of acceptance or rejection; interview; fee; credit or refund

(a) The management may require the right of prior approval of a purchaser of a mobilehome that will remain in the park and that the selling homeowner or his or her agent give notice of the sale to the management before the close of the sale. Approval cannot be withheld if the purchaser has the financial ability to pay the rent and charges of the park unless the management reasonably determines that, based on the purchaser's prior

tenancies, he or she will not comply with the rules and regulations of the park. In determining whether the purchaser has the financial ability to pay the rent and charges of the park, the management shall not require the purchaser to submit copies of any personal income tax returns in order to obtain approval for residency in the park. However, management may require the purchaser to document the amount and source of his or her gross monthly income or means of financial support.

Upon request of any prospective homeowner who proposes to purchase a mobilehome that will remain in the park, management shall inform that person of the information management will require in order to determine if the person will be acceptable as a homeowner in the park.

Within 15 business days of receiving all of the information requested from the prospective homeowner, the management shall notify the seller and the prospective homeowner, in writing, of either acceptance or rejection of the application, and the reason if rejected. During this 15-day period the prospective homeowner shall comply with the management's request, if any, for a personal interview. If the approval of a prospective homeowner is withheld for any reason other than those stated in this article, the management or owner may be held liable for all damages proximately resulting therefrom.

***30455** (b) If the management collects a fee or charge from a prospective purchaser of a mobilehome in order to obtain a financial report or credit rating, the full amount of the fee or charge shall be credited toward payment of the first month's rent for that mobilehome purchaser. If, for whatever reason, the prospective purchaser is rejected by the management, the management shall refund to the prospective purchaser the full amount of that fee or charge within 30 days from the date of rejection. If the prospective purchaser is approved by the management, but, for whatever reason, the prospective purchaser elects not to purchase the mobilehome, the management may retain the fee,

or a portion thereof, to defray its administrative costs under this section.

Supreme Court, U.S.
FILED
MAR 24 1999
CLERK

No. 98-1346

In The

Supreme Court of the United States

October Term, 1998

H.N. AND FRANCES C. BERGER FOUNDATION,

Petitioner,

v.

CITY OF ESCONDIDO, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division One

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the state court was correct in ruling that a City's mobilehome rent regulation ordinance was not an "as-applied" regulatory taking where the parkowner had stipulated that it was not contending that the application of the ordinance (1) had denied it a "fair return" nor (2) had deprived it of "substantially all economically viable economic use of its property" and the state court found that there was substantial evidence that the Ordinance as applied substantially advanced a legitimate state purpose.

LIST OF PARTIES

The parties to the proceeding below were the Petitioner H.N. and Frances C. Berger Foundation ("Berger") and Respondents City of Escondido ("City"), as well as five members or former members of the City of Escondido Mobilehome Park Rental Review Board ("Board") who were sued both individually, and as members of the Board: Jerry Harmon, Sid Hollins, Richard Foster, Lori Holt Pfeiler, and Elmer Cameron.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents' City of Escondido, et al. ("City") respectfully request that this Court deny Petitioner H.N. and Frances C. Berger Foundation's ("Berger") Petition for Writ of Certiorari ("Petition") seeking review of the California Court of Appeal decision in this case.

OPINIONS BELOW

On August 30, 1996, the California trial court (San Diego Superior Court, Case No. 63317) issued its Judgment granting City's Motion for Nonsuit and Dismissing Berger's Action. See Judgment, Petition Appendix, C1-C3; see also Statement of Decision, Petition Appendix, D1-D16.

On August 17, 1998, the California Court of Appeal (4th Civ. No. D027377) issued an unpublished decision affirming the Judgment of Dismissal. See Slip Opinion, Petition Appendix, A1-A22.

On November 24, 1998, the California Supreme Court (Case No. SO73664) issued an unpublished ruling denying Berger's Petition for Review. See Ruling, Petition Appendix, B1.

JURISDICTION

The California Court of Appeal Opinion was entered August 17, 1998. On November 24, 1998, the California Supreme Court denied Berger's Petition for Review. Berger's Petition for Certiorari was docketed with the

United States Supreme Court on February 22, 1999. The jurisdiction of the United States Supreme Court was invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

The California Mobilehome Residency Law (Cal. Civ. Code, Section 798 et seq.) governs many aspects of the relationship between a mobilehome park owner and a mobilehome owner residing on a rented space in a mobilehome park. [California Civil Code, Sections 798.55, 798.73, and 798.74 are set forth in the Petition Appendix, F1-F5.]

Proposition K, a voter initiative (the Escondido Mobilehome Rent Protection Ordinance) ("Ordinance"), established mobilehome space rent regulation for mobilehome parks located in the City. [An uncodified version of the Ordinance is set forth in Petition Appendix, E1-E10.][1]

[1] Pursuant to the Ordinance if a parkowner wants to increase space rents it must first obtain approval from the Mobilehome Park Rental Review Board (Board). Ordinance,

STATEMENT OF THE CASE

A. Background.

The City of Escondido is located in Northern San Diego County in the State of California. It has a substantial number of mobilehome parks and mobilehome owners located within its boundaries.[2]

On June 7, 1988, the City voters passed Proposition K, an initiative ordinance which established mobilehome park space rent regulation. Ordinance, Petition Appendix, E1-E10. The Ordinance became effective July 7, 1988.

On December 21, 1988, Fairfield Homes, Inc. (which had developed the Town and Country Club Mobilehome Park ("Park")) *gifted* this 155 space Park to the H.N. and Frances C. Berger Foundation ("Berger"). Petition Appendix, A2.

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section 3. The City Council is the Board. Ordinance, section 2(a). Following a hearing the Board, applying various factors, determines such rent increase as it determines to be just, fair and reasonable. Ordinance, section 4(g).

[2] A January 22, 1999 report by the California Department of Housing and Community Development listed 28 mobilehome parks and approximately 3600 mobilehome spaces in Escondido. According to a December 1998 report from the City's Rent Control Administrator, 2114 of these spaces were subject to the City's Rent Ordinance. The vast bulk of the remaining spaces were on rent control exempt long term leases, or exempt because they were resident owned.

B. Berger's Prior Suits Challenging City's Ordinance Were Dismissed.

On May 31, 1998, prior to seeking any rent increase under the Ordinance, Berger filed a state court action. *H.N. and Frances C. Berger Foundation v. City of Escondido*, San Diego Superior Court, No. N43874. It alleged that the Ordinance constituted a "taking" of its property because it did not permit Berger to automatically raise rents when a mobilehome was sold or transferred. It also alleged that the Ordinance was unconstitutional because no emergency existed to justify its imposition. Petition Appendix, D3.

On August 15, 1989, the trial court issued an Order Granting the City's Demurrers and dismissing the action. *Ibid.*[3]

On October 31, 1990, the Court of Appeal issued its decision affirming the lower court dismissals. *Yee v. City of Escondido*, 224 Cal.App.3d 1349 (1990). After the California Supreme Court denied review (224 Cal.App.3d at 1362) the United States Supreme Court granted certiorari, and on April 1, 1992, unanimously affirmed in *Yee v. City of Escondido*, 503 U.S. 519 (1992).

In *Yee*, this Court held that the City's Ordinance did not constitute a "physical taking" of Petitioners' property. 503 U.S. at 531-32, 538-39. This Court also held Petitioners' *facial* regulatory taking claim "ripe" (*Id.* at 534)

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[3] Berger's appeal (*H.N. and Frances C. Berger Foundation v. City of Escondido*, 4th Civ. No. D010769) was consolidated with eleven similar suits *sub nom, Yee v. City of Escondido*. Petition Appendix, D4.

but did not rule on the claim because it was not among the questions raised in the Petition for Certiorari. *Id.* at 535-39.

While the consolidated *Yee* case was still on appeal, on February 1, 1991, Berger filed a federal suit challenging the City's Ordinance on virtually identical grounds. *H.N. and Frances C. Berger Foundation v. City of Escondido,* U.S. Dist. Ct., So. Dist. Cal., No. 91-0153-K(BTM). Petition Appendix, D4.

On June 12, 1991, the District Court granted City's Motion to Dismiss, finding that Berger's federal action was barred by the res judicata effect of the prior state court decision in *Yee, supra,* 224 Cal.App.3d 1349. *Ibid.*

On June 19, 1992, after this Court's decision in *Yee,* Berger dismissed its appeal to the Ninth Circuit. *Ibid.*

C. The Instant Suit

On December 11, 1991, Berger filed an application seeking a monthly space rent increase of $69.70. Following hearings the Board awarded Berger a $10 per month per space increase. Petition Appendix, D4.

1. The Trial Court Proceedings

On February 7, 1994, Berger filed this action in state court. After City Demurred, Berger filed an Amended Complaint seeking a Writ of Administrative Mandamus, alleging that the Board's decision granting it a $10 rent increase was invalid and had denied Berger a "fair

return" and included causes of action for Inverse Condemnation, Declaratory and Injunctive Relief. *Id.* at D5-D7.

On January 31, 1995, the trial court issued an Order granting City's Motion that the Writ of Administrative Mandamus Cause of Action be heard first. *Id.* at D7. On March 7, 1995, the trial court granted in part Berger's request to augment the administrative record with certain evidence and remanded the matter to the Board. *Ibid.* In response the Board vacated its $10 rent decision and after new hearings voted to grant Berger a $16.12 per month per space rent increase.[4] *Ibid.*

On August 25, 1995, the trial court ruled that in light of the Board's new rent decision, Berger's Cause of Action for Administrative Mandamus was "moot."[5] *Id.* at D8.

On April 8, 1996, following the filing of Trial Briefs on the only remaining Cause of Action (Inverse Condemnation), the parties entered into certain stipulations (*Id.* at D9) including that Berger was not contending that it was "denied a fair return," nor that it was "denied substantially all economically viable use of its land."

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[4] In addition, in order to eliminate any possible harm due to the delay from its January 1994 decision, the Board granted Berger an additional interim $6.40 per month per space rent increase for 17 months. *Id.* at D7-D8.

[5] On February 5, 1996, the trial court also dismissed the Cause of Action for Injunctive and Declaratory Relief. *Id.* at D8.

On June 17, 1996, after Berger's Opening Statement, the trial court granted City's Motion for Nonsuit.[6] *Id.* at D10-D11.

2. The Court of Appeal Decision

On August 17, 1998, the Court of Appeal affirmed in an unpublished decision. Petition Appendix, A1-A22. Initially, it pointed out that pursuant to *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), a land use regulation applied to a particular property effected a taking if "it does not substantially advance legitimate state interests" or "denies an owner economically viable use of his land." Petition Appendix, A7. The Court concluded that Berger failed both prongs. *Id.* at A9.

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[6] Pursuant to California procedure a Motion for Nonsuit at the time of the Plaintiff's Opening Statement concedes the truth of the facts stated, but only for purposes of the nonsuit motion. 7 *Witkin*, California Procedure (4th Ed. 1997), "Trial," § 416. In making the motion the defendant does not waive his right to offer evidence in the event the motion is not granted. California Code of Civil Procedure, section 581c(a).

Berger's implication (Petition at 6-7) that the City would not have contested Berger's alleged "evidence" concerning the "premium" if the Motion for Nonsuit had been denied is wrong. Not only had the City filed a Motion in Limine (which was never decided due to the grant of the Nonsuit) to prevent Berger's expert from testifying because in deposition he had admitted "I have no conclusions in this case. . . . I have not studied this particular park," but also the City had its own expert who was prepared to rebut Berger's expert if Berger's expert was permitted to testify.

In discussing the "economic" prong, the Court indicated that for the term "taking" to have any meaning, the deprivation must be "substantial." Petition Appendix, A9-A11. Under the circumstances, the Court recognized that the term "substantially all economically viable use" was a "reasonably reliable measuring device in a regulatory taking case." *Id.* at A11. Since Berger had stipulated that it was not contending that it had been denied "substantially all economically viable use," the Court concluded that Berger had failed to meet the "economic" prong of the *Agins* test. *Ibid.*[7]

In discussing the "government interest" prong, the Court of Appeal rejected Berger's "heightened scrutiny" argument. Petition Appendix, A14. The Court pointed out that this case was not one of the "relatively narrow class of land use cases" described in *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 868 (1996), *cert. denied*, 519 U.S. 929 (1996), such as where a property owner had been denied all use of his property or where the City was trying to exact money as a condition for granting a permit. *Ibid.* Instead, the Court pointed out that the case was similar to *Kavanau v. Santa Monica Rent Control Board*, 16 Cal.4th 761, 775 (1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 856, 139 L.Ed.2d 755 (1998), where the Court had analyzed a rent

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[7] In discussing the "economic" prong, the Court of Appeal also indicated that a "fair return" inquiry was a proper precursor to determining whether or not Berger had been denied "substantially all economic viable use." *Id.* at A11-A13. The Court of Appeal concluded that since the trial court had correctly resolved that ultimate inquiry any error in its perception of the role of "fair return" in the *Agins* test was harmless. *Id.* at A13.

control ordinance using a multi-factor approach [citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)].

The Court of Appeal also cited *Landgate, Inc. v. California Coastal Commission*, 17 Cal.4th 1006, 1022 (1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 179, 142 L.Ed.2d 146 (1998), where the California Supreme Court had indicated that the proper inquiry is whether there is an "objectively, sufficient connection between the land use regulation in question and a legitimate governmental purpose so that the former may be said to substantially advance the latter." Petition Appendix, A15.

The Court of Appeal pointed out that this Court had accepted the general validity of rent control as advancing a legitimate governmental purpose (citing *Pennell v. City of San Jose*, 485 U.S. 1, 12-13 (1988)) and therefore there was "a strong presumption in favor of the Ordinance's validity." Petition Appendix, A15-A16.

The Court of Appeal rejected Berger's argument that "as applied" the Ordinance resulted in a "one time wealth transfer" which raised the cost of housing, rather than lowered it, and therefore was in contravention of the alleged stated goals of rent control. The Court pointed out that in the context of an "as applied" claim the focus is not on whether such a wealth transfer exists, but whether the rent increases provide a return sufficient to ameliorate the effects of this alleged "premium." *Id.* at A16. Since Berger had stipulated that it was not contending that it had been denied a "fair return" the Court held that Berger's argument must fail. *Ibid.* The Court also pointed out that to the extent that Berger was really

making a "facial challenge"[8] to the Ordinance, its facial claim was subject to res judicata,[9] would fail for lack of standing or ripeness and therefore should not be considered. *Ibid.*

The Court of Appeal also rejected Berger's argument that the application of the Ordinance was a "scheme" to drive down the value of its property, concluding that Berger's evidence would not show that the Board's actions were improper. Petition Appendix, A17-A19. Again referring to *Landgate, supra,* 17 Cal.4th at 1022, the Court pointed out that the focus should not be on an alleged "sinister purpose" but on whether the application of the regulation objectively "advanced some legitimate state purposes." Petition Appendix, A19. Utilizing that test, the Court concluded that the Board's rent decision had substantially advanced the purpose of the Ordinance in preventing "excessive" rent increases.[10] *Ibid.* The Court

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[8] The Court of Appeal noted that at least two federal courts (*Levald, Inc. v. City of Palm Desert,* 998 F.2d 680, 689 (9th Cir. 1993), *cert. denied,* 510 U.S. 1093 (1994) and *Carson Harbor Village Ltd. v. City of Carson,* 37 F.3d 468, 474 n.5 (9th Cir. 1994)) had specifically rejected the notion that Berger's challenge to the alleged "premium" was an "as applied" challenge. Petition Appendix, A16-A17.

[9] The Court of Appeal had earlier noted (Appendix at A-2, n.1) that Berger had been unsuccessful in its prior "facial" taking challenges to the Ordinance's validity.

[10] Berger's argument (Petition at 7) that the Court of Appeal erred in referring to tenants living on fixed incomes in the Park ignores the reality of mobilehome living in Southern California. A March 27, 1990 County of San Diego "County Wide Mobilehome Task Force Final Report" found that 80% of the mobilehome spaces in the County were occupied by "senior

further found that the $16.12 rent increase was supported by "substantial evidence,"[11] and therefore the "government interest" prong was also satisfied. *Ibid.*

On November 24, 1998, the California Supreme Court denied Berger's Petition for Renew. Petition Appendix, B1.

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households" who are "generally small elderly families with fixed incomes." *Id.* at 5. The Court of Appeal was aware that in response to Berger's request for a $69.70 rent increase the Board had received about 100 letters from Park residents explaining in heart wrenching detail how the requested increase would cause them extreme hardship. Appellant's Appendix at 66.

[11] Although as discussed *supra*, in the instant case Berger did not challenge that the $16.12 rent increase provided it with a "fair return," Berger later filed a new state suit challenging both the $16.12 and a subsequent $19.27 Board rent decisions. *H.N. and Frances C. Berger Foundation v. City of Escondido, et al.*, San Diego Superior Court, Nos. N69473 and N70537. After the trial court found that "substantial evidence" supported both decisions, it issued a Judgment dismissing both suits. On February 26, 1999, the Court of Appeal affirmed in part and reversed in part in an unpublished decision. *H.N. and Frances C. Berger Foundation v. City of Escondido*, 4th Cir. No. D029003. It concluded that "although the board's findings represent a conscientious effort to balance all competing social and economic factors, they lack an essential basis for the authorized rental increases: the setting of a fair return on value, allowing for inflation without placing undue emphasis on the "gift" "factor or other financing effects." Slip. Op. at 18. The Court of Appeal therefore ordered the matter remanded back to the City for further administrative proceedings. Slip. Op. at 24. In regard to Berger's remaining causes of action for regulatory taking, declaratory relief and violation of 42 U.S.C. § 1983 the Court of Appeal affirmed the dismissal of those claims. Slip. Op. at 23-24.

WHY THIS WRIT SHOULD BE DENIED

I

THIS IS NOT AN APPROPRIATE CASE TO DETERMINE IF VACANCY CONTROL IN A MOBILEHOME RENT ORDINANCE CONSTITUTES A REGULATORY TAKING.

The primary thrust of Berger's Petition is that the Ordinance is a "regulatory taking" because it does not permit Berger to automatically raise rents whenever a mobilehome is sold or transferred. As a result of this restriction on the space rent of the new mobilehome owner (often referred to as "vacancy control"[12]), the prior mobilehome owner allegedly receives a "premium" from the purchaser corresponding to the mobilehome's increased value attributable to the Ordinance. Petition at 4. Berger further argues that this "premium" accrues only to the initial homeowners (a "one time wealth transfer") "at the time the Rent Ordinance was adopted" and does not benefit subsequent buyers. Petition at 4-5. As a result Berger argues that the Ordinance fails to substantially advance the Ordinance's purported goal of preserving the supply of affordable rental housing and since it therefore does not advance legitimate state interests it is a "regulatory taking." Petition at 5.

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[12] In the mobilehome context the term "vacancy control" is in reality a misnomer. As this Court noted in *Yee v. City of Escondido, supra,* 503 U.S. at 523 ("When the mobilehome owner wishes to move, the mobilehome is usually sold in place, and the purchaser continues to rent the pad on which the mobilehome is located.")

Berger argues (Petition at 8-11) that its Petition should be granted in order to resolve the "Regulatory Taking Issue Raised But Left Open By This Court in *Yee v. City of Escondido.*"

In *Yee v. City of Escondido, supra,* this Court considered virtually identical allegations by Yee and other City Parkowners (including Berger). 503 U.S. at 525-26. As discussed, *supra,* in *Yee,* this Court held that the Ordinance did not constitute a "physical taking" of the parkowner's land. 503 U.S. at 530, 532, 539.

During the course of its opinion, this Court indicated that Yee's "premium" argument was "perhaps within the scope of our regulatory taking cases" (*Id.* at 527) and the alleged "effect might have some bearing on whether the Ordinance causes a *regulatory* taking, as it may shed some light on whether there is a sufficient nexus between the effect of the Ordinance and the objectives it is supposed to advance." *Id.* at 530.[13] However, when asked by Petitioners to address the "regulatory taking" issue, this Court after first concluding that Petitioner's *as-applied* "regulatory taking" claim was "unripe" (because they had not sought rent increases) (*Id.* at 533-34) indicated that a *facial* regulatory challenge would be "ripe." *Id.* at 534.

Nevertheless, this Court did not decide this *facial* "regulatory taking" claim because such a claim had not

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[13] This Court also opined that to the extent that the Ordinance deprives Petitioners of the ability to choose their incoming tenants, "this effect may be relevant to a regulatory taking argument." *Ibid.*

been "presented" or "fairly included" in Yee's Petition for Certiorari. *Id.* at 535-38. In addition, the Court noted that unlike the "physical taking" question lower courts "have not reached conflicting results, so far as we know, on whether similar mobilehome rent control ordinances effect regulatory takings." *Id.* at 537-38. This Court concluded by stating "We leave the regulatory taking issue for the California Courts to address in the first issue." *Id.* at 538.[14]

A. The City's Ordinance Does Not Provide for Vacancy Control.

Although at the time of this Court's decision in *Yee*, it was assumed by all parties that the City's Ordinance provided for "vacancy control," in January 1996 another City parkowner sued in state court contending that the Ordinance did not in fact provide for "vacancy control." On March 8, 1996, the trial court issued a Preliminary Injunction preventing the City from enforcing the Ordinance in such a manner as to provide for "vacancy control." The Court of Appeal affirmed, concluding that the Ordinance "does not either expressly or impliedly provide for vacancy control." *Thomsen v. City of Escondido*, 49 Cal.App.4th 884, 897 (1996).[15]

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[14] Justices Blackmun and Souter concurred, but did not join in the Court's opinion concerning the Petitioner's allegations and arguments relating to the regulatory taking claim. *Id.* at 539.

[15] On January 15, 1997, the California Supreme Court denied the City's Petition for Review. *Thomsen, supra*, 49 Cal. App. 4th at 902.

Therefore, since at least March 1996[16] Berger has been free to set "such entry level rental rates as may be mutually agreeable between [it] and the prospective purchasers without such entry rents being limited by [the Ordinance]." *Thomsen, supra,* 49 Cal.App.4th at 890.

The Ordinance was an initiative ordinance, and can therefore only be modified by the voters. Under the circumstances, it is unlikely that Berger will be subjected to "vacancy control" in the near future.[17] In the absence of a current or reasonably foreseeable future application of "vacancy control" to Berger, this case is not an appropriate vehicle for a determination of whether or not "vacancy control" is a "regulatory taking". As the Court of Appeal pointed out in this case (Petition Appendix, A17), "Presumably, if the Ordinance were repealed, any

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[16] Even earlier, in May 1995 another Court decision provided Berger and other City parkowners with an alternative way to avoid "vacancy control." Pursuant to California Civil Code, section 798.17, a parkowner and a mobilehome owner may enter into a long term lease which is "exempt" from local rent control. Soon after the Ordinance was enacted the City enacted Ordinance 88-50 which prevented Parkowners from *requiring* new homeowners to sign such rent control exempt leases as a condition of renting a space in their parks. In May 1995, in *Mobilepark West Homeowners Ass'n v. Escondido Mobilepark West,* 35 Cal.App.4th 32 (1995), the Court of Appeal held Ordinance 91-19 (a later version of Ordinance 88-50) invalid as an improper amendment of an initiative measure (the Ordinance) and also partially preempted by Civil Code section 798.17.

[17] Since *Thomsen, supra,* City voters have twice considered and rejected ballot measures which expressly provided for "vacancy control." (Proposition O in November 1996 and Proposition T in November 1998.)

'wealth transfer' would soon evaporate." Cf., *United States Department of Justice v. Provenzano*, 469 U.S. 14, 15 (1984) (A controversy may end if the statute which is the basis for the action is repealed or if the challenged conduct is modified).

B. Premium Based Challenges to a Rent Control Ordinance are Facial Challenges and Berger Has Denied That it is Making a Facial Challenge.

In contrast to *Yee*, where Yee and the other Petitioners (including Berger) filed suit within a few months after the adoption of the Ordinance (see 503 U.S. at 525) Berger did not file this suit until February 1994, five and one half years after the Ordinance's enactment. As a result the statute of limitations on any *facial* taking claim has long ago passed. See, e.g., *De Anza Properties X, Ltd. v. County of Santa Cruz*, 936 F.2d 1084 (9th Cir. 1991) (Court held a claim that the County's vacancy control provision was a "taking" accrued when the mobilehome rent control ordinance was enacted in 1982 and was barred by applicable statutes of limitation); *Levald, Inc. v. City of Palm Desert*, *supra*, 998 F.2d at 688-89 (Facial "regulatory taking" challenge to the vacancy control provision of a mobilehome rent control ordinance was barred when not brought within one year of enactment).

In addition to the bar of the statute of limitations, a determination that Berger's "premium" claim is a *facial* regulatory claim also means that it is subject to *res judicata* based on the dismissal of Berger's prior state and

federal court suits which had raised similar claims.[18] See also, *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362 (9th Cir. 1993) (Prior state court ruling upholding rent ordinance against physical taking claim based on lack of vacancy decontrol provision held to preclude not only "physical" but "regulatory taking claim" in federal court).

In addition, Berger also lacked "standing" to raise this *facial* regulatory taking challenge because when Berger acquired the Park in December of 1988 the Park was already subject to the Ordinance. In *Carson Harbor, supra*, 37 F.3d at 476-77, the Court held that a park owner lacked the "standing" to facially challenge the validity of an Ordinance in light of the fact that it had purchased the property after the Ordinance had been in effect and the "price paid for the property presumably reflected the market value of the property taken."[19]

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[18] Although in *Yee*, this Court indicated that it was unclear whether the Court of Appeal in *Yee v. City of Escondido, supra*, 224 Cal.App.3d 1349, had addressed the "regulatory taking" issue (503 U.S. at 534), in a subsequent case the state courts clearly indicated that they believed that Yee's original state court suit had *included* the "regulatory taking" issue. The day after this Court's *Yee* decision, Yee filed another state court action alleging the Ordinance effected a "regulatory taking." The trial court dismissed on *res judicata* grounds and the Court of Appeal affirmed, ruling both on the merits that "the Ordinance does not effect a regulatory taking" and also that "the doctrine of res judicata supports the trial court's decision." *Yee v. Mobilehome Park Rental Review Board*, 62 Cal.App.4th 1409, 1415 (1998).

[19] *Carson Harbor* is not unique in applying this "standing" requirement to regulatory taking challenges. See e.g., *Anello v. Zoning Board of Appeals*, 89 N.Y.2d 535 (1997), *cert. denied*, ___

In an attempt to avoid these bars Berger has consistently denied that it was making any "facial" challenge.[20] However, both the state and federal courts agree that Berger's position is wrong. In *Levald, Inc. v. City of Palm Desert, supra,* the Ninth Circuit specifically considered and rejected the argument that the claim that a Rent Ordinance results in the grant of a "premium" is an *as-applied* claim. The Court pointed out:

> That argument, however, is relevant only to a facial, not an as-applied, regulatory challenge. It is not a particular application of the statute that gives rise to the premium; the premium arises solely from the existence of the statute itself. Given that the existence of the premium does not give rise to an as-applied challenge, it seems that an as-applied challenge would have to focus on the reasonableness of the return on Levald's investment – in other words whether the allowable rent increases are large enough – and not on the "transfer" of the premium.

998 F.2d at 689.[21]

U.S. ___, 118 S.Ct. 2, 138 L.Ed.2d 1036 (1997) (Since Petitioner acquired property after enactment of a Steep-Slope Ordinance, its enactment did not deprive her of any investment backed expectation).

[20] In its Appellant's Opening Brief in the Court of Appeal, Berger entitled its last argument "No Part of the Berger Foundation's Claim Involves a "Facial" Challenge to the Rent Ordinance." *Id.* at 49.

[21] Here, of course, as discussed *supra,* Berger stipulated that it was not contending that it has been denied a "fair return" on its property. See Petition Appendix, D19.

See also, *Carson Harbor, supra,* 37 F.3d at 474 n.5 (Court rejected the notion that the alleged transfer of a "premium" under a mobilehome rent control ordinance is an *as-applied* regulatory taking claim).

The California cases have also treated similar "premium" claims as *facial* claims. For example, in *Yee v. Mobilehome Park Rental Review Board, supra,* 62 Cal.App.4th 1409-1410, the Court of Appeal in reiterating that this Ordinance did not constitute a "regulatory taking" stated:

> Finally, '[w]e reject the notion that [the transfer of the premium] constitutes an as-applied claim.' [Citation.] The premium is 'relevant only to a facial, not an as-applied, regulatory challenge. It is not a particular *application* of the statute that gives rise to the premium; the premium arises solely from the existence of the statute itself.' [Citation.] Because we find the Ordinance a proper economic regulation on its face, the Yees' regulatory challenge must fail."

See also, *Sandpiper Mobile Village v. City of Carpenteria,* 10 Cal.App.4th 542, 548-51 (1992), *cert. denied,* 507 U.S. 1032 (1993) (Court determined that the parkowner's claim that due to the alleged "premium" the mobilehome rent control ordinance did not advance a legitimate governmental interest was a *facial* challenge and therefore ripe for adjudication); *Westwinds Mobile Home Park v. Mobilehome Park Rental Review Board,* 30 Cal.App.4th 84, 95 (1994) (Court again described parkowner's challenge to the alleged "premium" as a *facial* challenge).

Under the circumstances the Court of Appeal was clearly correct in concluding that Berger's "premium" and "one time wealth transfer" claim was a "facial" not

an "as-applied" challenge and therefore "inappropriate for consideration." Petition Appendix, A17.

II

THERE IS NO DIRECT CONFLICT BETWEEN THE COURT OF APPEAL *BERGER* DECISION AND THE NINTH CIRCUIT'S DECISION IN *RICHARDSON V. CITY AND COUNTY OF HONOLULU*

Contrary to Berger's argument (Petition at 11-15), there is no direct conflict between the Court of Appeal's decision in *Berger* and the Ninth Circuit's decision in *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), *cert. denied*, ___ U.S. ___, 119 S.Ct. 168, 142 L.Ed.2d 137 (1998). In *Richardson*, the Ninth Circuit addressed the constitutionality of a Honolulu Ordinance which limited the number and timing of renegotiation of ground lease rents for residential condominiums; imposed a maximum ceiling on the renegotiated rents; and permitted a condominium owner-occupant to transfer his/her leasehold interest in the underlying land to a new owner-occupant of the condominium, keeping the same renegotiated land rent. 124 F.3d at 1163-64.

Certain landowners immediately (on the day the Ordinance was enacted, *Id.* at 1154) filed suits in federal court alleging *inter alia* that the Ordinance (91-96) constituted a "taking" because it created a "premium" which an owner-occupant could capture when he/she sold a condominium subject to the renegotiated rent. *Id.* at 1164. After determining that the landowner's claims were "facial regulatory taking claims" and therefore "ripe" (*Id.*

at 1165) the Court held that in the absence of any mechanism that prevented the owner-occupant from capturing the value of the reduced land rent in the form of a premium on the condominium sale meant that the cost of housing would remain the same and since therefore the Ordinance would not substantially further its goal of creating affordable owner-occupied housing in Honolulu the Ordinance was a regulatory taking. 124 F.3d at 1166.

Contrary to Berger's argument (Petition at 14), there is *no* indication that Berger ever raised the *Richardson* case in the lower appellate courts.[22]

In any event, *Richardson* is distinguishable from *Berger* in several respects. First, *Berger* involves mobilehome space rentals not condominium ground leases. As this Court apparently recognized in *Yee, supra,* 503 U.S. at 523-24, because of the substantial investments by mobilehome owners[23] and the relative "immobility" of

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[22] Berger did request to file a Supplemental Brief in August 1997 (prior to the Ninth Circuit's *Richardson* decision) relating to a recent California Supreme Court decision, *Kavanau v. Santa Monica Rent Control Board, supra.* On September 24, 1997, the Court of Appeal denied Berger's request to file a Supplemental Brief addressing *Kavanau.* There is no indication that Berger ever filed a second request seeking to submit supplemental briefing on *Richardson.* Berger's request for Oral Argument dated March 4, 1998, did not refer to *Richardson.* City does not remember any reference to *Richardson* in the May 11, 1998 oral argument. In its September 23, 1998, Petition for Review to the California Supreme Court, Berger did not refer to *Richardson.* Finally, in its October 23, 1998, Reply to Answer to Petition for Review, Berger did not refer to *Richardson.*

[23] See, K. Baar, "The Right to Sell the 'Im'Mobile Manufactured Home in its Rent Controlled Space in the

mobilehomes, mobilehome owners are often accorded unique protections.[24]

To City's knowledge, since this Court's *Yee* decision, no reported state or federal court decision had held that a *mobilehome* rent control ordinance constitutes a "regulatory taking" because it creates an alleged "premium." See, e.g., *Sandpiper Mobile Village v. City of Carpenteria, supra,* 10 Cal.App.4th at 549-51; *Palomar Mobilehome Park Ass'n v. City of San Marcos, supra,* 989 F.2d at 365; *Levald, Inc. v. City of Palm Desert, supra,* 998 F.2d at 688; *Westwinds Mobile Home Park v. Mobilehome Park Rental Review Board, supra,* 30 Cal.App.4th at 95 nn.7 & 8; *Carson Harbor Village Ltd. v. City of Carson, supra,* 37 F.3d at 472; *Yee v. Mobilehome Park Rental Review Board, supra,* 62 Cal.App.4th at 1415-16, 1419-21.

Second, unlike the Honolulu Ordinance, whose purpose was apparently limited to "maintaining affordable owner-occupied residential housing," the Escondido

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'Im'Mobile Homepark: Valid Regulation or Unconstitutional Taking," 24 Urban Lawyer 157, 159 & nn. 10, 12 (1992) ("In California, mobilehome prices ranging from $50,000 to $100,000 are standard . . . [a Los Angeles survey indicated that] on the average mobilehome owners have triple the investment of park owners in their spaces").

[24] For example, in 1995, the California state legislature enacted the Costa-Hawkins Rental Housing Act, 1995 Cal. Stats. Ch. 331 (codified as Cal. Civil Code, sections 1954.50-.53) which preempted local ordinances and phased out vacancy control applicable to all "owners" of residential rental property *except* those relating to mobilehomes or mobilehome parks.

In March 1996 a California state Initiative (Proposition 199) which would have extended "vacancy control" to mobilehome park owners was defeated. See AA 100.

Ordinance had much broader purposes. As the Court explained in *Yee v. Mobilehome Park Rental Review Board, supra,* 62 Cal.App.4th at 1420:

> The Yee's contention the ordinance fails to substantially advance a legitimate state interest must fail. The Ordinance substantially advances the City's goal of protecting current homeowners from rent increases in a captive and limited market. As recently stated by the Ninth Circuit, 'the prohibition of rent increases at the termination of a tenancy would further the law's goals, at least insofar as the purpose is to protect the investments of existing tenants.' [Citation.] '[T]he unfettered right of a park owner to raise the rent on a space when ownership of a mobile home was transferred might make it difficult for a mobile home owner to sell . . . . [T]he ordinance protects owners' investments in their units.' [Citation.]
>
> The Ordinance also advances the City's legitimate goal of protecting future homeowners by creating a climate in which purchasers can order and predict the economic investment they will make in the purchase of a mobilehome. The Ordinance advances legitimate City interests and is, therefore, valid.

Third, as discussed *supra,* in *Richardson* the landowners filed an immediate "facial" attack on the Ordinance and Berger waited over five years and then purported to file its claim as an "as-applied" challenge.

Finally, it is respectfully submitted that the application of the *Richardson* analysis to mobilehome rent ordinance is flawed because it does not address the issue of

market power. Mobilehome park owners exercise oligopolistic market power with respect to rent increases. Absent vacancy control, they can capture a resident's equity in his home by unreasonably increasing rents on sale. In contrast, the mobilehome owner has no market power to charge above market prices for his home. Moreover, regardless of the purchase price he pays for a mobilehome, absent vacancy control, the new buyer will still lose any equity he builds up in his home if the parkowner raises rents exorbitantly during his occupancy, and again later upon his resale.

At least in regard to mobilehome ordinances, vacancy control is not a "zero sum game." From an affordable housing point of view, even with vacancy control the initial costs of mobilehome ownership for prospective purchasers (including purchase costs and space rents) will often be much lower than those costs in the absence of vacancy control.[25]

In any event, since *Richardson* is distinguishable and was not raised in the lower courts it should not be grounds for granting this Petition.

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[25] See, e.g., K. Baar, "Vacancy Control Under Montclair's Mobilehome Rent Ordinance," June 30, 1998, supplemented July 15, 1998. In a study commissioned by the City of Montclair, California, Dr. Baar concluded that Montclair's Ordinances which provided for *vacancy decontrol* had adverse impacts on affordable housing as compared with surrounding cities which had vacancy control ordinances.

III

THE HEIGHTENED SCRUTINY STANDARD IS NOT APPLICABLE TO THIS TYPE OF REGULATORY TAKING CLAIM

Berger argues (Petition at 15-20) that the Court of Appeal erred by not applying the heightened level of judicial scrutiny established by *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

Both *Nollan* and *Dolan* are factually distinguishable in that both cases required the *dedication* of real property in return for obtaining building permits. Neither case related to the landlord-tenant context much less the application of a rent control ordinance. In contrast, in *Pennell v. City of San Jose, supra*, 485 U.S. at 12-13 and n.6, a case which did involve rent control, this Court did not mention the *Nollan* test and appeared to apply a much more deferential standard affirming that the protection of tenants from excessive rent increases is a legitimate governmental interest. Similarly, while in *Yee, supra*, this Court briefly mentioned *Nollan* (see 503 U.S. at 530) it never articulated that a "strict scrutiny" test was applicable to its examination of rent control ordinances but to the contrary indicated that such landlord-tenant regulation instead was subject to its multifactor analysis. *Id.* at 529.[26]

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[26] This Court cited to *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) which in turn referred to *Penn Central Transportation Co. v. New York City, supra*, 438 U.S. at 124.

Following the California Supreme Court's decisions in *Ehrlich v. City of Culver City, supra,* 12 Cal.4th at 868 the Court of Appeal in *Berger* properly held that this case does not fit into the "narrow range of cases" which trigger the heightened standard of scrutiny of *Nollan* and *Dolan*. Petition Appendix, A13-14.[27]

Instead, the Court of Appeal evaluated the "application" of the Rent Ordinance under a "reasonably necessary" standard of review based on the California Supreme Court decisions in *Kavanau v. Santa Monica Rent Control Board, supra,* 16 Cal.4th at 775 and *Landgate, Inc. v. California Coastal Commission, supra,* 17 Cal.4th at 1022. Petition Appendix, A15-19. After noting that there is "a strong presumption in favor of the Ordinance's validity" (*Id.* at A16) the Court addressed and rejected Berger's "one time wealth transfer" and "City's scheme" arguments. *Id.* at A16-19. Focusing instead on the *actual application* of the Ordinance to Berger's property the Court of Appeal concluded:

> Here, there is no doubt the Board's decision substantially advances the purpose of the Ordinance. Berger sought a rent increase of nearly $70, and the Board approved $16.12. The tenants

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[27] Subsequent to the Court of Appeal decision in *Berger*, the California Supreme Court again specifically addressed whether the heightened scrutiny standard applies to rent control legislation and concluded "the standard of review for generally applicable rent control laws must be at least as deferential as for generally applicable zoning laws and other legislative land use controls. Thus, the party challenging rent control must show 'that it constitutes an arbitrary regulation of property rights.' " *Santa Monica Beach, Ltd. v. Superior Court,* 19 Cal.4th 952, 967 (1999).

> at the Town and Country, especially those living on fixed incomes, were certainly benefited by such a limitation on rent increases on their spaces. *The rent increase ultimately approved by the Board fell within the range of increases called for by its analytical methods, and was in fact at the high end of one of them.* We therefore conclude the Board's decision *was supported by substantial evidence* and satisfies the government interest prong. [Emphasis added.] *Id.* at A-19.[28]

IV

THERE IS NO REAL CONFLICT BETWEEN CALIFORNIA STATE COURTS AND NEW YORK REGARDING THE LEVEL OF SCRUTINY APPLIED TO RENT ORDINANCES

Citing *Seawall Associates v. City of New York*, 74 N.Y.2d 92 (1989), *cert. denied*, 493 U.S. 976 (1989) and *Manocherian v. Lenox Hill Hospital*, 84 N.Y.2d 385 (1994), *cert. denied*, 514 U.S. 1109 (1995), Berger argues that there is a conflict between the state courts of California and New York regarding the level of scrutiny in regulatory takings cases. Petition 20-21. Berger's argument is without merit because both those cases are distinguishable.

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[28] Berger's quotation of this portion of the Court of Appeal decision (Petition at 17-18) leaves out the crucial elements (emphasized above) which indicated that the Court of Appeal had in fact analyzed the Board's decision to determine its actual impact. In any event, as discussed *supra*, note 11, in a subsequent ruling the Court of Appeal further reviewed the Board's $16.12 rent decision and concluded that the matter should be remanded for a new hearing.

In *Seawall, supra,* the New York Court examined a New York City law which required certain building owners to (1) rehabilitate and make habitable their buildings; (2) lease every unit at controlled rents to "bonafide tenants"; (3) provide civil penalties if any unit remained vacant for 30 days; and (4) prohibited the conversion, alteration or demolition of the buildings. 74 N.Y.2d at 100. The Court distinguished the cases upholding rent control and other landlord-tenant regulations on the grounds that those cases (as does *Berger*) had involved restrictions imposed on existing tenancies where the landlord had voluntarily put their properties to use for residential housing and held that the New York law was both a physical and regulatory taking. *Id.* at 102, 105.

After pointing out that the New York City provisions had effectively deprived the landlords of all economically viable use of their properties (*Id.* at 110), the Court also concluded that the law did not substantially advance legitimate state interests because it imposed too great a burden on the landlords to meet the societal problem of the homeless. *Id.* at 117.[29]

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[29] Subsequent to this Court's *Yee* decision the New York Court decided *Rent Stabilization Association v. Higgins,* 83 N.Y.2d 156 (1993), *cert. denied,* 512 U.S. 1213 (1994), which considered whether regulations enlarging the class of "family members" entitled to succeed to a rent-regulated apartment on the death or departure of the tenant was a "taking." Distinguishing *Seawall, supra,* the Court held that there was no "physical" or "regulatory taking" because the regulation did not require a new use of the already rent regulated property, did not "affect the owner's right to receive the regulated rents, unchallenged as a reasonable return," and *unlike Seawall,* there was a nexus between the challenged regulation and the stated purpose of

In *Manocherian,* owners challenged the validity of Chapter 940 of the New York laws of 1984 which required them to offer renewal leases to Lenox Hill Hospital for apartments occupied by some of the Hospital's employees. Chapter 940 exclusively related to the renewal rights of not-for-profit hospitals which had formerly subleased rent stabilized apartments to their employees. The Court pointed out that the legislative history of Chapter 940 revealed that Lenox Hill Hospital, not the actual apartment dwellers, was the "principal agent in urging the amendment" and was the "primary and real beneficiary of this legislation." 84 N.Y.2d at 391.

The Court distinguished this Court's decision in *Yee v. City of Escondido, supra,* stating that *Yee* dealt with an entirely different statutory scheme because in *Yee* the challenge was to a local rent control ordinance (the same ordinance challenged here) that applied to all mobilehome parks in the municipality and Chapter 940 was a "targeted, narrow, special interest . . . " local law. 84 N.Y.2d at 399. It was in this context that the Court held that there was a fundamental defect in Chapter 940 because it was enacted purely to serve the private interests of Lenox Hill and therefore failed to advance a legitimate state interest.

Since neither *Seawall* nor *Manocherian* involved mobilehome ordinances and are clearly distinguishable there is no conflict warranting Supreme Court review.

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preventing the eviction of identified beneficiaries. 83 N.Y.2d at 172.

CONCLUSION

This case is not an appropriate vehicle to review the issue of whether vacancy control in a mobilehome rent control context results in a "premium" or "one time wealth transfer" and is a regulatory taking. First, the City's Ordinance does not provide for vacancy control. Second, Berger's argument against vacancy control is a "facial claim," however Berger has disavowed that it is making such a claim. Third, the alleged conflict with the Ninth Circuit *Richardson* decision was not raised below and in any event *Richardson* is distinguishable. Fourth, the Court of Appeal applied the appropriate standard of judicial scrutiny to the Board's actions. Fifth, the New York cases cited by Berger as conflicting are distinguishable. Under the circumstances, Berger's Petition for Certiorari should be denied.

Dated: March 24, 1999

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1998

H.N. AND FRANCES C. BERGER FOUNDATION
Petitioner,
vs.
CITY OF ESCONDIDO, et al.,
Respondents.

Petition for Writ of Certiorari
to the
California Court of Appeal
4th Appellate District

BRIEF OF WESTERN MOBILEHOME PARKOWNERS' ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Western Mobilehome Parkowners' Association (*"amicus"* or "WMA") is the leading trade association for California's mobilehome and manufactured housing industry. WMA is a nonprofit, tax-exempt organization organized under the laws of California.[1]

WMA's members include owners and operators of more than 1800 mobilehome and manufactured housing communities throughout California. For many young families and older citizens, affordable housing means manufactured housing. Rent controls, regulations of land use and constitutional protection of property rights are matters of great interest to WMA members.

Yee v. Escondido, 503 U.S. 519 (1992) *("Yee")* acknowledged that local controls of mobilehome space rents might take property by regulation without compensation, in violation of the Fifth Amendment. The Court declined to decide issues outside the scope of Mr. Yee's petition for *certiorari,* while "awaiting a case in which the [regulatory taking] issue was fully litigated. . . ." 503 U.S. at 521. *Berger Foundation* is that case.

The decision below effectively disregards this Court's decisions in *Yee, Nollan v. California Coastal Commission,* 483 U.S. 825 (1987) *("Nollan")* and *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992) *("Lucas"),* by limiting those precedents to their facts. Rather than permit Berger Foundation to prove that Escondido's ordinance operates unconstitutionally — as *Yee* contemplated — the lower court reasoned that no taking occurs, so long as the court could imagine (without receiving any evidence) some benefit.

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[1] This brief is submitted with the written consent of all parties, filed with the Clerk of the Court. It was prepared exclusively by *amicus'* counsel at *amicus'* exclusive expense.

The Fifth Amendment requires more. Berger Foundation is entitled to prove that Escondido's ordinance serves no legitimate purpose, but merely enriches a fortunate few at the expense of a handful of property owners.

Berger Foundation's petition for *certiorari* presents important issues left undecided in *Yee*:

> Do regulations that enrich a small group, by granting them marketable rights to occupy another citizen's property, take property in violation of the Fifth and Fourteenth Amendments?
>
> What scrutiny should the courts give to claims that regulations take property? May lower courts presume that regulations advance some presumed legitimate purpose, or, under this Court's precedents, must they examine evidence to decide these factual issues?

Finally, the decision below illustrates the California courts' tendency to interpret this Court's precedents narrowly and restrictively. These are matters whose importance extends beyond Escondido, or manufactured housing.

STATEMENT OF THE CASE

Modern mobilehomes are not trailers. They are manufactured homes, built in sections, towed into place on a prepared space or "pad", assembled, connected to utilities and then fitted with awnings, porches and the like. Their size and comforts compare favorably with postwar tract homes. Mobilehome communities have long appealed to senior citizens, and as prices for conventional homes have risen, mobilehomes have become increasingly popular "starter" homes for young families. Typically, mobilehome residents own their homes, and rent the space from the owner of the mobilehome park, who provides private streets, recreational facilities, common areas and amenities.

California regulates mobilehome tenancies through a Mobilehome Residency Law (codified as § 798 *et seq.* of the California Civil Code). Owners may not terminate tenancies without cause (Cal. Civ. Code § 798.55), require removal of mobilehomes when tenancies end (Cal. Civ. Code § 798.73), or disapprove incoming residents, if they are creditworthy, and likely to abide by park rules (Cal. Civ. Code § 798.74). As a consequence, mobilehomes are usually sold in place when a resident wants to move. Residents sell their homes to new residents, subject only to the owner's approval of credit and references.

Escondido's ordinance (the "Escondido Ordinance"), enacted by the voters in 1988, reduced mobilehome space rents to 1986 levels. Property owners may apply to the City Council, sitting as a Mobilehome Park Rental Review Board, for rent increases in order to pay for capital improvements and certain cost increases. All other increases are misdemeanors. There is no provision for adjustment of rents when mobilehomes are sold in place.

The Escondido Ordinance, operating in conjunction with the Mobilehome Residency Law, assures residents permanent tenure and bargain rent, so long as they pay the rent and observe park rules. Incoming residents enjoy the same rights, so mobilehomes change hands at huge premiums — often, tens of thousands of dollars more than comparable homes in dealer inventories or unregulated mobilehome parks. *Amicus* believes that these premiums represent the value of a statutory leasehold — a permanent, transferable, possessory interest in the owner's property — created by operation of law and given to the tenants without just compensation, in violation of the Fifth Amendment.

Berger Foundation alleged, in a complaint modeled upon *Yee,* that interests in its property had been taken by regulation, in violation of the Fifth Amendment. The California Court of Appeal acknowledged that since Mr. Justice

Holmes' seminal opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), the courts have recognized that regulations which go too far may effect a taking. "The inquiry as to when a regulation has gone too far is necessarily one of fact." (Appendix A-7). Nonetheless, the lower court upheld a nonsuit, denying Berger Foundation any opportunity to prove that Escondido's Ordinance operates as alleged and appropriates property without compensation, in violation of the Fifth Amendment.

The lower court reached this conclusion by relying upon California precedents to limit the "heightened scrutiny" contemplated by *Nollan* and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) *("Dolan")* to "out-and-out [plans] of extortion" (such as *Nollan*) or deprivations of "all economically viable use" (such as *Lucas*). Under California's restrictive interpretation of those precedents, all other situations, such as this challenge to Escondido's Ordinance, "need not be subject to a heightened *Dolan*-style level of scrutiny." (Appendix A-15). In essence, California has limited *Nollan* and *Dolan* to their facts.

In this way, judicial conjecture about the presumed benefits of lower rents makes unnecessary any evidence of the law's actual effect. Berger Foundation offered evidence that no one in Escondido actually pays the controlled rents. Those in residence at the time of enactment pay far less, as resale premiums offset rent. Their successors pay far more, since they must pay both monthly rent and the large resale premiums. Thus, the ordinance does not achieve its ostensible purpose of controlling rents, but enriches a favored group of voters at the expense of a few property owners. This is the very evil the Takings Clause was meant to prevent. "One of the principal purposes of the Takings Clause is 'to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by

the public as a whole.' " *Dolan,* 512 U.S. at 384, quoting, *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The lower court reasoned that even if Berger Foundation could prove a one-time wealth transfer, without any public benefit, there would be no taking so long as the owner received a return "sufficient to ameliorate the effects of [the] premium." (Appendix A-19). Fair return was not an issue below, because of pretrial stipulations, and no precedent exists for the astonishing principle — implicit in the lower court's reasoning — that owners of income property are entitled to no compensation if interests in their property are taken, so long as their properties earn adequate returns.

In fact, whenever property is taken, compensation must be paid. This Court has "frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 316 (1987).

SUMMARY OF ARGUMENT

Berger Foundation alleges, and offered evidence to prove, that Escondido's Ordinance appropriates interests in its property, and transfers those interests to residents. When mobilehomes are sold in place, residents receive the value of the interests taken as large resale premiums — nominally paid for the mobilehome coach, but representing the value of the right to occupy the owner's land at bargain rates. The Escondido Ordinance thus enriches fortunate residents in place at the time of enactment, at the owner's expense, without any benefit to future residents who must pay the resale premiums.

These facts, if proved, constitute violations of the Takings Clause of the Fifth Amendment, since interests in property are taken from owners and given to residents, without

compensation, and without benefitting anyone but those fortunate residents who were in place when Escondido's initiative passed. *Amicus* respectfully suggests that there could be no clearer example of a regulation that — far from substantially advancing a legitimate purpose — merely rewards one group of voters at the expense of a few property owners.

This Court has twice ruled, in *Nollan* and *Dolan*, that regulatory taking claims like Berger Foundation's deserve greater scrutiny than a cursory determination that they have some rational basis. The Takings Clause is not a mere pleading requirement, but "as much a part of the Bill of Rights as the First Amendment or Fourth Amendment" and cannot be "relegated to the status of a poor relation. . . ." *Dolan,* 512 U.S. at 392. Here, lower courts following restrictive California interpretations of *Nollan* and *Dolan* surmised some benefit to residents, and based on that surmise, declined even to consider Berger Foundation's evidence. Judicial scrutiny requires more than conjecture and surmise.

ARGUMENT

I.

ESCONDIDO'S ORDINANCE DOES NOT SUBSTANTIALLY ADVANCE A LEGITIMATE GOVERNMENTAL INTEREST, AND, THUS, CONSTITUTES A TAKING.

Statutes take property if they do not *substantially* advance legitimate state interests. *Nollan,* 483 U.S. at 835, fn. 3. *Nollan* held that California's imposition of an easement upon the Nollans' property had little connection with the justifications advanced for the exaction. Without an adequate nexus between ends and means, the Court reasoned, the purpose became "quite simply, the obtaining of an easement . . . but without payment of compensation." 483

U.S. at 838. This Court also stressed that the nexus requirement is more stringent than its counterpart under the Equal Protection Clause. *Id.* at 834-35 fn. 3. More is required, the Court held, than a plausible reason:

> We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. . . . [O]ur cases describe the condition for abridgment of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest.

Id. at 841 (emphasis in original). Measured by these standards, Escondido's Ordinance cannot pass constitutional muster.

The Escondido Ordinance contains no recitals or findings, so its purposes are obscure. The lower courts presumed that the ordinance was intended to benefit Berger Foundation's residents, "especially those living on fixed incomes" (Appendix A-19) but the Escondido Ordinance does not, and cannot, achieve these purposes.

Controlling rents is the supposed purpose. *But no one actually pays the controlled rent.* Some pay far more; a lucky few pay far less. Tenants in residence when the ordinance was enacted pay far less. Later residents pay far more. Tenants in place in June 1988 pay controlled rent until departure, when they receive the value of future rent savings in the form of resale premiums on their mobilehome coaches. The premiums offset rent payments during occupancy, so overall, original residents pay far less than the controlled rents.

By contrast, incoming tenants do not pay controlled rents, and receive no benefit from controlled rents, since they must pay large premiums, equal to the capitalized value of the difference between controlled rents and market rents. New

residents pay the equivalent of market rent, but pay the difference between market rent and controlled rent to the former tenant, in advance, rather than to the owner of the property. No legitimate purpose is served by such an irrational scheme. The only goal accomplished is a one-time wealth transfer from property owners to tenants in residence at the time of the election in June 1988.

The fortunate citizens in residence when the initiative passed may collect windfalls when they move away and sell the bargain leaseholds created by the Ordinance, as well as their mobilehome coaches. Other residents will pay (or, at still greater cost, finance) resale premiums that are likely to wipe out any saving. If, as Berger Foundation alleges, Escondido's Ordinance merely enriches a favored few, at the property owner's expense, it advances no legitimate purpose and violates the Takings Clause of the Fifth Amendment.

II.

TO DETERMINE WHETHER REGULATIONS SUBSTANTIALLY ADVANCE LEGITIMATE INTERESTS, COURTS MAY NOT SIMPLY ASSUME SOME RATIONAL BASIS, BUT MUST CONSIDER EVIDENCE.

Berger Foundation's claims are matters of fact, capable of proof, through evidence of market activity, records from operation of their property, and expert testimony from appraisers, economists and other experts. The Court of Appeal recognized as much, acknowledging that "[t]he inquiry as to when a regulation has gone too far is necessarily one of fact." (Appendix A-7).

The lower court nonetheless decided these facts based on conjecture, without evidence, by presuming benefits in much the same way that courts now reject substantive due process arguments if some rational basis may be assumed.

This reasoning is contrary to *Nollan,* which held the Takings Clause "to be more than a pleading requirement, and compliance with it [requires] more than an exercise in cleverness and imagination." 483 U.S. 841. *Nollan* distinguished takings claims — where regulations must "substantially advance" the "legitimate state purpose" — from lesser standards of scrutiny that apply to many due process and equal protection claims.

> We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved . . . not that "the State *'could rationally have decided'* that the measure adopted might achieve the State's objective."

483 U.S. 835 n. 3. Judicial conjecture about possible rational bases for disputed regulations cannot end the analysis. Erudite speculation is no substitute for evidence.

The lower court acknowledged that *Nollan* and *Lucas* "may require a reviewing court to subject such governmental action to higher than mere 'rational basis' scrutiny", but relied upon California precedent limiting *Nollan* and *Dolan* to "a relatively narrow class of land use cases". (Appendix A-13-14). For the rest, California courts attempt to identify some legitimate purpose, and then hypothesize possible benefits, without considering evidence of the regulation's actual effect.

In practice, this standard is indistinguishable from the "rational basis" test rejected by *Nollan* and *Dolan.* Since rent controls may be legitimate, and Berger Foundation did not contend that it had been denied a fair return, the court disposed of Berger Foundation's claim with an almost offhand observation that low rents presumably benefitted Berger Foundation's residents. (Appendix A-19).

Conjecture is no substitute for evidence that Escondido's Ordinance merely provides a windfall to those who were

residents when voters adopted rent control, at the owners' expense, while raising housing costs for future residents. Berger Foundation claims that Escondido's Ordinance operates perversely, to defeat its ostensible purposes, without advancing any substantial or legitimate interest.

Berger Foundation is entitled to an opportunity to prove its claims. The result below, and underlying California precedents, undermine *Nollan* and *Dolan* by permitting courts to assume or presume legitimacy, without looking past bare recitals or ostensible purposes to the real effects of stringent regulations that impose substantial costs upon a handful of property owners.

CONCLUSION

For these reasons, *amicus* respectfully requests that this Court grant Berger Foundation's petition for a writ of *certiorari* to review and overturn the decision below, which:

- Contravenes authoritative decisions of this Court,
- Denies property owners any opportunity to prove regulatory taking claims recognized by this Court.

Dated: March 23, 1999.

Respectfully submitted,

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Supreme Court, U.S.
FILED
APR 1 1999
CLERK

(4)

No. 98-1346

In the

Supreme Court of the United States

October Term, 1998

H. N. AND FRANCES C. BERGER FOUNDATION,
Petitioner,

v.

CITY OF ESCONDIDO, JERRY HARMON, individually and as a member of the City of Escondido Mobilehome Rent Review Board; SID HOLLINS, individually and as a member of the City of Escondido Mobilehome Rent Review Board; RICHARD A. FOSTER, individually and as a member of the City of Escondido Mobilehome Rent Review Board; LORI HOLT PFEILER, individually and as a member of the City of Escondido Mobilehome Rent Review Board; ELMER CAMERON, individually and as a member of the City of Escondido Mobilehome Rent Review Board,
Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal, Fourth Appellate District

PETITIONER'S REPLY BRIEF

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Pursuant to Supreme Court Rule 15.6, Petitioner H. N. and Frances C. Berger Foundation (Berger Foundation) hereby replies to the Respondents' Brief in Opposition (Opp.) filed by Respondents City of Escondido, *et al.* (City), on March 24, 1999.

The petition for certiorari asks this Court to take up a question raised but left unanswered in *Yee v. City of Escondido*, 503 U.S. 519 (1992), whether the application of Escondido's mobile home park rent control law, which transfers marketable interests in the Berger Foundation's mobile home park to certain residents of that park without just compensation, comprises a regulatory taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The opposition brief does not address the merits of this question, but instead raises a number of procedural and prudential side issues. As will be demonstrated below, none of these side issues has merit.

I

THE RECENT DISCOVERY THAT THE CITY WAS WITHOUT AUTHORITY TO IMPOSE VACANCY CONTROL UNDER THE RENT ORDINANCE DOES NOT ALTER THE FACT THAT THE CITY *DID* UNLAWFULLY ENFORCE VACANCY CONTROL THROUGHOUT THE PERIOD RELEVANT TO THIS LITIGATION

Although the City concedes that this case involves a challenge to the same ordinance that was at issue in *Yee*, and that the Berger Foundation raises "virtually identical allegations" as the *Yee* plaintiffs, Opp. at 13, the City nevertheless argues that this case does not present an appropriate vehicle to address the regulatory taking question left open in *Yee*.

The City bases this peculiar argument on a 1996 California Court of Appeal opinion construing the Rent Ordinance to exclude vacancy control. Opp. at 14. Vacancy control--the

maintaining of rent restrictions even after a leasehold ends--is thought to be an important factor in generating and transferring to park residents the "placement value," or premium, that is the basis of the taking claim. *See* Werner Z. Hirsch and Joel G. Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. Rev. 399, 426-32 (1988). Just how important it may be in any given case, of course, is a factual question that must be determined at trial. Nevertheless, the City asserts that the Berger Foundation's taking claim is fatally undermined because the Foundation *may* have been able to set new rents on vacancy "since at least March 1996"--26 months *after* the events that gave rise to this litigation! Opp. at 15.

Throughout the time period relevant to this case, the City vigorously enforced the Rent Ordinance as if it did in fact provide for vacancy control. Indeed, the City's zeal extended so far as to initiate criminal prosecution of park owners who attempted to increase space rents when a mobile home in their park changed ownership.[1] Under these circumstances, of course, all parties consistently acted *as if* the Rent Ordinance included vacancy control.

Whether the subsequent revelation that the City had no legal basis for its punitive enforcement actions would affect the Berger Foundation's damages for the 1991-95 period is, again,

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[1] In June, 1995, 16 months after the complaint in this case was filed, the City notified a park manager that under the Rent Ordinance,

> if you offer a new resident a month to month tenancy . . . for a space in your park, that resident would be entitled to the same space rent as the present tenant. . . . Should you raise your rents to new tenants for tenancy of 12 months or less you will be in violation of the City's Rent Control Ordinance *and subject to criminal action*.

Thomsen v. City of Escondido, 49 Cal. App. 4th 884, 888-89 (1996) (emphasis added).

a factual question for the trial court to consider on remand.[2] However, it has no relevance whatsoever to the question that was before the court below and is now before this Court, of whether--*assuming the facts alleged in its 1994 complaint are true*--the Berger Foundation has adequately set forth a claim for a regulatory taking.

II

A REGULATORY SCHEME THAT IS UNCONSTITUTIONAL ON ITS FACE CANNOT BE CONSTITUTIONAL AS APPLIED TO ANY PARTICULAR PROPERTY

The principal argument of the opposition brief is that the Berger Foundation has set forth allegations which, if proven at trial, would establish that the Rent Ordinance violates the Takings Clause *on its face*, yet the complaint alleges a constitutional violation *as applied* to the Berger Foundation's property. Opp. at 16-20. In essence, the City's argument is that a law such as the Rent Ordinance, which is alleged to advance no purpose except to effect a one-time wealth transfer to a small political elite, can *only* be challenged on its face. Once the statute of limitations for facial challenges runs, no property owner can ever again contest the *application* of the Rent Ordinance to any specific property based on its failure to substantially advance legitimate state interests.

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[2] The City cites to the fallacious claim of the court below that the *prospective* repeal (or judicial invalidation) of the Rent Ordinance would somehow eliminate all the damages the Berger Foundation suffered from ten years of the City's heavy-handed enforcement of its unconstitutional regulations. Opp. at 16. As is typical of the decision below, however, this is simply the court's *speculation* concerning an empirical question that should rightfully be determined at trial.

The City cites to a small number of state and federal courts that have accepted this argument (Opp. at 18-19). However, these decisions miss the thrust of the Berger Foundation's complaint. The City has stipulated that the value of the Berger Foundation's mobile home park has been reduced by the existence of the Rent Ordinance, and the City has applied the ordinance to prevent the Foundation from implementing rent increases to which it was otherwise entitled. Appendix to the Petition for Certiorari (Pet. App.) A-4-5. The City claims the Rent Ordinance gives it the authority to thus interfere with the peaceful use and enjoyment of the Berger Foundation's property. Yet if the Rent Ordinance is unconstitutional on its face--that is, if it utterly fails to substantially advance a legitimate state interest and is unconstitutional *no matter how it is applied*, it cannot lawfully be applied to impose financial burdens on the Berger Foundation's property. From this perspective, it is completely irrelevant that those who illicitly profited from the adoption of the Rent Ordinance did so at the time the measure was passed. The City is still using this measure--which serves only to maintain the value of a one-time wealth transfer that took place a decade ago--to impose ongoing burdens on property owners like the Berger Foundation.

Stripped of sophistry, the City's argument is that once it has gotten away with applying an unconstitutional enactment for five years, its victims thereafter lose their rights to challenge the application of the measure to their land. This is not the law. If, as the Berger Foundation alleges, the sole function of the Rent Ordinance was to enable initial residents of the Town and Country to capture a one-time wealth transfer from the Berger Foundation, the City cannot constitutionally apply this law to restrict the Berger Foundation's use of its property without complying with the constitutional mandate of just compensation.

III

THE CONFLICTS IDENTIFIED IN THE PETITION REQUIRE THIS COURT'S ATTENTION TO RESTORE UNIFORMITY OF TREATMENT OF REGULATORY TAKING CLAIMS UNDER THE FIFTH AMENDMENT

A. The Decision Below Stands in Direct Conflict with the Ninth Circuit's *Richardson* Decision

The City misapprehends the extent and significance of the conflict of the decision below with the Ninth Circuit Court of Appeals' opinion in *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997). The City attempts to distinguish *Richardson* on three grounds. First, the opposition brief argues that *Richardson* involved allegations of a "facial" taking rather than a taking as applied to a particular property. Opp. at 20, 23. Second, the City urges that owners of mobile home coaches are entitled to greater governmental protections than owners of condominium apartments. Opp. at 21-22, 23-24. Finally, the City suggests that its Rent Ordinance may substantially advance *some* legitimate state interest, even if--like the *Richardson* rent ordinance--it fails to preserve or increase the supply of affordable housing. Opp. at 22-23. None of these distinctions cuts in the City's favor.

As has been set forth above, no logic supports the City's position that an ordinance which is *facially* unconstitutional could somehow become constitutional as applied to a particular property. If laws like those at issue in *Richardson* and in the present case fail to substantially advance a legitimate interest "no matter how [they] are applied,"[3] they must certainly fail the same test in the context of a specific as-applied challenge.

Whether residents of mobile home parks should receive greater governmental benefits than residents of condominium apartments is, of course, a question for the legislature, not the

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[3] *Yee*, 503 U.S. at 534.

courts. However, the allegedly inferior "bargaining power" of mobile home residents (Opp. at 23-24) does not trump the plain text of the Takings Clause. Nor is there any significance to the City's recitation of California cases that have upheld mobile home rent control against taking challenges. Opp. at 22. What the City neglects to point out is that, over the period in question, *no California court found a compensable regulatory taking under any circumstances whatsoever.* The plaintiffs in the cases cited by the City did not lose because they were challenging mobile home rent control. They lost simply because they were property owners, who have uniformly been denied just compensation in every reported Fifth Amendment regulatory taking case filed in the California courts for at least the past 20 years. No special consideration attached to the fact that the challenged regulations involved mobile home parks.

Finally, the City is not technically correct in claiming that the purposes of the Rent Ordinance are "much broader" than those of the *Richardson* rent law. Opp. at 23. For in fact, *the Rent Ordinance sets forth no statement of purpose or necessity whatsoever.* Pet. App. E-1. However, this does not give reviewing courts a blank check to *imagine* that some legitimate interest might possibly be advanced, as was done in the decision the City cites. Opp. at 23. This is precisely the kind of deferential review this Court foreclosed in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).[4]

By the City's reasoning, the *Richardson* ordinance would have been upheld if only its drafters had been devious enough

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[4] "We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, *Agins v. Tiburon,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980), not that 'the State "*could rationally have decided*" that the measure adopted might achieve the State's objective.'" *Nollan*, 483 U.S. at 834 n.3.

not to state the law's objectives. Although this ploy has met with success in the California courts, it would not be enough to salvage the constitutionality of the Rent Ordinance in the Ninth Circuit under *Richardson.*

B. The Conflict Between the State Courts of New York and California Must Be Resolved

In addition to conflicting with the Ninth Circuit's *Richardson* opinion, the decision below exemplifies a deep-seated conflict between the state courts of California and New York on the application of federal constitutional law. The City minimizes the conflict with *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (1989), and *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (1994), by dwelling on trivial factual distinctions. Opp. at 27-29. It is certainly true, as the City notes, that "neither *Seawall* nor *Manocherian* involved mobilehome ordinances." Opp. at 29. But there is no exception to the Takings Clause for mobile home parks. In both *Seawall* and *Manocherian* the New York Court of Appeals found that rental property regulations violated the Takings Clause by failing to substantially advance legitimate state interests, under the close scrutiny required by this Court in *Nollan* and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). As the City itself points out, this is precisely the analysis the court below and the California Supreme Court have held to be ***inapplicable*** to rent control ordinances. Opp. at 26; Pet. App. A-13-15. This is a fundamental legal conflict in the application of federal constitutional law by the courts of the most populous states in this nation, which can only be resolved by this Court.

CONCLUSION

The petition for a writ of certiorari should be GRANTED.

DATED: April, 1999.

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